



PARALEGAL TRAINING MANUAL



AMKA Africa Justice Initiative

Paralegal Training Manual



This concise guide is your go-to resource for mastering the essentials of legal practice. From understanding legal principles to honing research and drafting skill.

House Rules:

1. Respect all participants and their viewpoints.
2. Attend all sessions punctually.
3. Participate actively in discussions and activities.
4. Silence your phones and avoid disruptions during sessions.
5. Maintain a respectful and inclusive atmosphere.
6. Follow any COVID-19 safety measures in place.
7. Keep confidential information shared within the training.

Objectives:

- To provide a comprehensive understanding of various legal topics.
- To empower participants to advocate for human rights and social justice.
- To equip participants with practical skills in dispute resolution and legal support.
- To foster a sense of community and collaboration among participants.

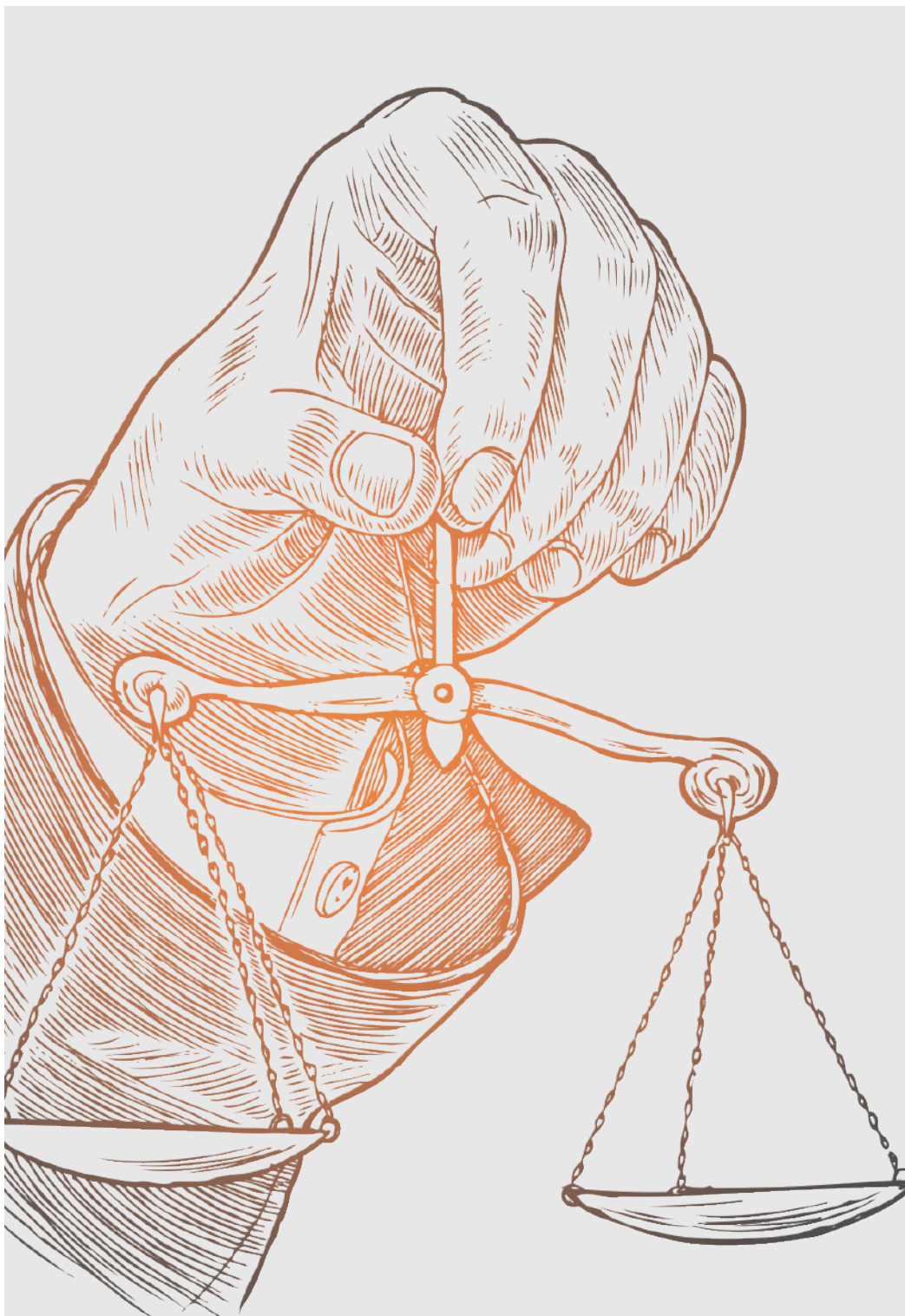
Outcomes:

By the end of this training, participants will:

1. Have a solid foundation in various areas of law.
2. Be able to identify and address legal issues in their communities.
3. Understand the importance of human rights and social justice.
4. Be capable of engaging in dispute resolution and mediation.
5. Build a network of like-minded individuals for future collaboration.

Methodology:

- Lectures and presentations by expert speakers.
- Group discussions and case study analysis.
- Practical problem-solving exercises.
- Plenary sessions to share insights and experiences.
- Multimedia resources, such as videos.
- Group presentations for hands-on experience.
- Interactive icebreakers and team-building activities.



CHAPTER ONE:

Introduction To Law & Sources Of Law In Kenya

Introduction to Law

Generally, law is any set of rules that guide the conduct of individuals/groups in a given set up and is enforced by those in authority. They include the Constitution, Acts of Parliament and/or rules. Law may start from the family and community levels, to national and international levels.

At the family level, there are rules and/or laws that guide the behaviour of the members for purposes of ensuring cohesiveness. For example, it may be the rule that the father is the head of the house or that all children must be home before dark. At the community level, there may be rules for example stating that a certain person is the head of the village or that youth must always be respectful to the elderly.

At the national level, laws are mainly agreed upon through legislative processes/organs (parliament) and include matters related to how people will be governed. National laws are usually passed by representatives of the people such as Members of the National Assembly and Senate. 4 Laws can be written or unwritten

The Purpose of Law

1. Law is vital in any given group or society as it brings sanity and ensures each person is treated equally and gets the chance to advance in life.
2. The law exists to protect rights and freedoms of individuals and groups. The Constitution and other laws provide for these rights and freedoms and in the event they are violated, the law comes in to restore them and ensures those responsible are punished.
3. The law sets minimum standards that guide individuals and groups behaviours. It provides for crimes that will not be tolerated and any person who engages in such crime is punishable under the law.
4. The law maintains order in society by ensuring individuals and groups do not exceed the prescribed limits acceptable by all. When limits are exceeded then the law comes in to restore the balance and bring semblance of order
5. The law is also useful in resolving disputes between individuals and groups or entities.
6. In a society where people have different values, needs and aspirations, disputes are inevitable. When these disputes arise, then the law comes in to ensure their resolution and brings justice to all parties involved. Because of the above reasons, it is then vital for any group/society to have laws. These laws must be agreed upon and should always be applied equally to all persons. The rule of law dictates that each action of individuals and their leaders must be guided by law and not personal wants and desires.

1.1. HIERARCHY OF LAWS

Section 3 the Judicature Act lists the sources of law hierarchy as:

- i. The constitution
- ii. Written statute law and subsidiary regulations thereof
- iii. Common law
- iv. Doctrines of equity
- v. Statutes of general application in force in England on the 12th August, 1897
- vi. judge-made law/ Precedents
- vii. African customary law

Statutes of General Application refer to rules and regulations that were applicable in England and their application extended to Kenya through colonialism. They only apply in Kenya where there is no other written law, and as far as circumstances permit. *African customary law* is applicable in civil disputes in which one or more of the parties to the dispute is subject to it or affected by it. Application of customary law must not be repugnant to justice and morality or inconsistent with any written law.

1.2. INSTITUTIONS FOR THE ADMINISTRATION OF JUSTICE

Courts are the main institutions for administration of justice in Kenya. The structure and jurisdictional hierarchy of Kenyan courts is established by the Constitution and the Judicature Act. In addition to the mainstream courts, there are a number of tribunals with powers similar to those of the courts, known *quasi-judicial* powers. Tribunals are established under various statutes. There are also a number of bodies, institutions and public administrators who exercise administrative powers to adjudicate disputes. The Constitution under Articles 67 and 159 recognizes and promotes the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

1.3. STRUCTURE AND HIERARCHY OF THE COURTS IN KENYA

- i. Supreme Court
- ii. Court of Appeal
- iii. High Court/Environment and Land Court/ Employment and Labour Relations Court
- iv. Chief Magistrates' Court
- v. Senior Principal Magistrates' court
- vi. Principal Magistrates' Court
- vii. Senior Resident Magistrates
- viii. Resident Magistrates' Court

1.4. SPECIAL JURISDICTION COURTS

1.4.1. Environment and Land Court

Environment and Land Court (ELC) handles cases on environment and land. ELC is of the status of the High Court. Section 13(1) of the Environment and Land Court Act No.19 of 2011 confers jurisdiction on the court in the following terms: The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

1.4.2. Employment and Labour Relations Court

Employment and Labour Relations Court (ELRC) adjudicates on employment and labour relations disputes. It is of the status of the High Court. Section 12(1) of the Employment and Labor Relations Court confers jurisdiction on the court in the following terms: The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations.

1.4.3. Kadhis' Courts

They are established under the Kadhis' Courts Act. They are presided over by the Chief Kadhi and a number of Kadhis, appointed by the Judicial Service Commission. These courts hear civil cases regarding personal law matters for people who profess the Muslim faith. They include marriage, divorce, and succession matters. The rules of evidence applicable in these courts are based on Muslim law. Appeals from the Kadhis' courts are filed in the High Court.

Note: All parties to a dispute must accept the jurisdiction of a Kadhis' Court. Muslims have discretion to file personal law matters at the magistrates' courts or the High court instead of Kadhis' court.

1.4.4. Court Martial

Martial courts are established under Article 169 of the Constitution. They hear criminal cases against members of the Kenya Defense Forces (the army, navy and the air force). They are presided over by a judge or advocate appointed by the Chief of General Staff. Appeals from the Court Martial are heard by the High Court.

1.5. CONSTITUTIONAL COMMISSIONS & INDEPENDENT OFFICES

The Constitution and specific Statutes donates powers to some Constitutional Commissions (CC) and independent offices to receive complaints from the citizens and institutions, to conduct investigations and make findings and to undertake conciliation, mediation and negotiation. These commissions include:

- i. The Kenya National Human Rights & Equality Commission
- ii. The National Land Commission
- iii. The Commission on Administrative Justice
- iv. The Independent Policing Oversight Authority
- v. The Judicial Service Commission
- vi. The Independent Electoral and Boundaries Commission

The Kenya National Commission on Human Rights (KNCHR) Commission:

The Kenya National Commission on Human Rights (KNCHR) is an independent National Human Rights Institution created by Article 59 of the Constitution of Kenya 2010 and established through the KNCHR Act of Parliament (the Kenya National Commission on Human Rights Act, 2011). It is the state's lead agency in the promotion and protection of human rights.

The National Gender and Equality Commission (NGEC)

The National Gender and Equality Commission is an independent National Human Rights Institution created by Article 59 of the Constitution of Kenya 2010 and established through the NGEC Act of Parliament, Chapter 5C, Laws of Kenya.

The key function and mandate of the commission as stipulated under section 8(a) of the establishing act is to: promote gender equality and freedom from discrimination in accordance with Article 27 of the Constitution.

The National Commission on the Administration of Justice

The NCAJ was established in 2011 under Section 34 of the Judicial Service Act (No.1 of 2011) as a high-level policymaking, implementation, oversight and coordinating body.

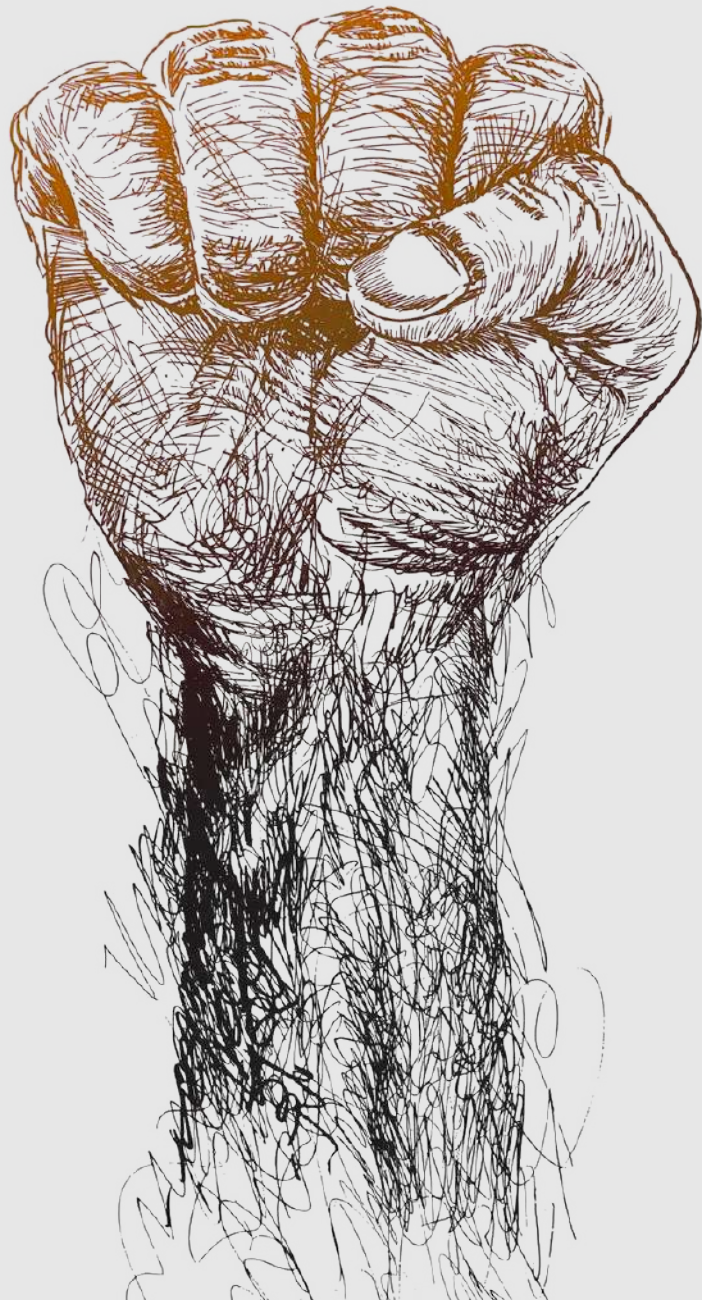
The overarching mandate of the NCAJ is to ensure a coordinated, efficient, effective, and consultative approach to the administration of justice and undertaking reforms in the justice sector. Specifically, NCAJ formulates policies relating to the administration of justice, monitors their implementation, and reviews strategies for the efficient administration of justice. Further, NCAJ facilitates the establishment of CUCs and mobilises resources for the efficient administration of justice. Primarily, NCAJ focuses on coordination of the justice sector and spearheads reform agenda in legal, policy and administrative arena.

Court Users Committees

The CUCs are forums that bring together players, both state and non-state, involved in the administration of justice at the local level. The CUCs ensure accountability and performance of the justice actors and cultivate partnerships amongst various stakeholders in the justice sector. CUCs are expected to resolve local disputes regarding the administration of justice and find local solutions to emerging issues. They are required to meet every quarter, address emerging issues and implement their work plans.

BRIEF MANDATES OF SOME NCAJ AGENCIES

1. **The Judiciary**, established under Chapter 10 of the Constitution, is a critical institution in the administration of justice in Kenya. Its primary function is to dispense justice by resolving cases. Under Article 159 (1) of the Kenyan Constitution, judicial authority is vested and exercised by courts and tribunals. The courts consist of the Supreme Court, Court of Appeal, High Court, Employment and Labour Relations Court (ELRC), Environment and Land Court (ELC), Magistrates Court, Small Claims Court, Kadhi Courts and Tribunals.
2. **The Office of the Director of Public Prosecutions (ODPP)**, established pursuant to Article 157 (1) of the Constitution of Kenya and the ODPP Act No. 2 of 2013, prosecutes all persons charged with criminal offences. The Director of Public Prosecutions can institute criminal proceedings against any person before any court other than a court martial. Further, the DPP can discontinue any criminal proceedings commenced by itself or any other person in any court before judgment is delivered.
3. **The National Police Service (NPS)**, established under Article 243 of the Kenyan Constitution, provides national security. The provision of national security entails protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability, prosperity, and other national interests. Further, the NPS undertakes investigations on criminal conduct and apprehends offenders.
4. **The Office of the Attorney General and Department of Justice (OAG&DOJ)** is established pursuant to Article 156 of the Constitution of Kenya and Office of the Attorney General Act No. 49 of 2012. The OAG&DOJ provides legal advice to the Government. The Office also represents the Government in court, promotes the rule of law and defends the public interest. In addition, the Attorney General serves as the Cabinet Secretary in charge of matters relating to justice.
5. **The Kenya Prisons Service (KPS)** is established as a uniformed and disciplined entity under the Prisons Act Cap 90 and Borstal Institutions Act Cap 92 Laws of Kenya. The Service is domiciled under the Ministry of Interior and Coordination of National Government. In the administration of justice, the Service's core function is to contain and rehabilitate offenders.
6. **The Probation and Aftercare Services (PACS)** Department supervises, rehabilitates, and reintegrates offenders serving non-custodial sentences within the community following the determination of cases by courts. Further, the Department generates advisory reports to courts and penal organs for bail, sentencing, and pre-release decision-making.
7. **The Witness Protection Agency (WPA)** is established under Section 3A (1) of the Witness Protection Act, 2011. The Agency is mandated to provide special protection on behalf of the State for persons possessing important information who face potential risk or intimidation due to their cooperation with the prosecution and other law enforcement agencies.
8. **The Ethics and Anti-Corruption Commission (EACC)** is a public body established under Section 3 (1) of the Ethics and Anti-Corruption Commission Act, 2011. The Commission is mandated to combat and prevent corruption, economic crime, and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics, and anti-corruption.
9. **The Kenya National Commission on Human Rights (KNCHR)** is an independent National Human Rights Institution created by Article 59 of the Constitution and the Kenya National Commission on Human Rights Act, 2011. The Commission promotes and protects human rights and acts as a watchdog over the Government in observance of human rights.
10. **The Commission on Administrative Justice (CAJ)**, also known as the Office of the Ombudsman, is a constitutional commission established under Article 59 of the Kenyan Constitution and the Commission on Administrative Justice Act, 2011. Its core mandate is to resolve maladministration in the public sector.
11. **The National Land Commission (NLC)** is established under Article 67 of the Constitution to handle land matters with the specific mandate anchored in the National Land Commission Act 2012, Land Act 2012, Land Registration Act 2012, and National Land Policy 2009. The Commission investigates complaints received on historical land injustices and recommends appropriate redress.
12. **The Law Society of Kenya (LSK)**, established under the Law Society of Kenya Act, 2014 and composed of practising advocates, represents individuals in courts in the litigation process, thus playing a critical role in advancing the rule of law in the justice sector. The LSK also promotes professional competence in the legal profession and formulates policies. Also, LSK assists the Government in the administration of justice and practice of laws in Kenya. Further, LSK assists the public in matters ancillary or incidental to the law.



CHAPTER TWO:

Human Rights

2.1. WHAT ARE “HUMAN RIGHTS”?

Article 19 (3) of the Constitution defines human rights as entitlements which belong to all human beings as a consequence of being human. Therefore, human rights are those standards without which people cannot live with dignity. Human rights are the same for all human beings regardless of sex, gender, race, religion, political or other opinion, national or social origin or other status. Rights create correlative relationships between the state and its citizens. For example, children have a right to education; the government has the correlative duty or obligation to ensure that the right is realised.

2.2. CHARACTERISTICS OF HUMAN RIGHTS

- i. Universal. They are enjoyed by all people, all the time, all rights, everywhere, forever.
- ii. Inalienable. Cannot be taken away by anyone
- iii. Indivisible. All rights are equally important and cannot be separated into parts
- iv. Interdependent. They are interrelated; the realisation of one right contributes to the realisation of another.

2.3. CATEGORIES OF HUMAN RIGHTS

Although interdependent, human rights can be classified into three main categories: civil and political rights; economic, social and cultural rights; group/ development rights.

2.3.1. Civil and Political Rights

They are of civil and political nature. They are referred to as ‘first generation’ rights. They include: the right to life, equality and non-discrimination, freedom of association, the right to equal protection of the law, the right to property, the right to family, the right to privacy, freedom of movement, freedom of speech, freedom of assembly, the right to a fair trial, freedom of religion, the right to participate in governance, the right to vote and be elected, among others. Civil and political rights require states to refrain from infringing the rights.

They are enshrined in the Universal Declaration of Human Rights (UDHR) in 1948. They are also set out in the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People’s Rights (African Charter) among other specific conventions.

2.3.2. Economic, Social and Cultural Rights

This category of rights is referred to as the ‘second generation’ rights. They relate to people’s sense of belonging, dignity, survival and preservation of cultural practices. They require governments to take positive steps to fulfil them. The rights include: the right to

education, right to health, right to social security, right to fair labour practices, right to food and shelter, right to culture, right to just and favourable working conditions, right to social security and social benefits, right to form, join and participate in trade unions and to strike among others.

They are enshrined in UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter and other specific conventions such as the Convention on Elimination of all forms of Discrimination Against Women (CEDAW), Convention on Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

2.3.3. Developmental/Group Rights

They are referred to as ‘third generation rights’. They belong to the wider community and other forms of groupings. They include: the right to development, the right to self-determination, the right to a clean and healthy environment, and the right to protection as a minority.

They are enshrined in the UDHR, ICCPR, ICESCR and more widely enshrined in the African Charter. The three, UDHR, ICCPR and ICESCR, together are considered as the International Bill of Rights. Other important international and regional human rights instruments include: the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (African Children’s Charter), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of Persons with Disabilities (CRPD) and the International Labour Organisation (ILO) conventions.

The ICESCR is implemented by Committee on Economic, Social & Cultural Rights (CESCR), the CRC is implemented by the United Nations Children’s Fund (UNICEF), the Africa Children’s Charter is implemented by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the CEDAW is implemented by the Committee on the Elimination of Discrimination against Women, the CAT is implemented by the Committee Against Torture, the CRPD is implemented by the Committee on the Rights of Persons with Disabilities and the ILO accomplishes its work through three main bodies which comprise governments’, employers’ and workers’ representatives which are: the International Labour Conference; the Governing Body; and the International Labour Office.

2.3.4. State’s Obligations Imposed by Human Rights Law

Article 21(1) of the Constitution clearly set out the states obligations thus, “*It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*” The Constitution requires the state to take legislative, policy, administrative, judicial and other measures, to realise citizen’s enjoyment of the rights provided, including progressive realisation of

the social economic rights guaranteed under Article 43. In the same line, Article 21(2) commits all State organs and public officers to address the needs of vulnerable groups within society, including members of minority and marginalised communities.

Obligation to Respect: The state is required to respect the concerned rights by refraining from violating them, denying or limiting equal enjoyment of the right by all persons, including minorities. For instance, obligation to respect requires states to abstain from enforcing and imposing discriminatory laws, policies and practices relating to fundamental rights. An example of violation is the enactment and implementation of laws which allow the state to listen-in to citizen's private phone conversations.

In Mitu-Bell Welfare Society v Attorney General & 2 others, the court stated that the duty to respect implies that the state has a duty to refrain from interfering directly or indirectly with the enjoyment of the right in question.

Obligation to Protect: Requires states to adopt legislation or take other measures to ensure equal enjoyment of the rights protected. The state is obligated to ensure that third parties do not limit people's enjoyment of the rights, and to take actions against third parties who violate the rights. For example, state failure to enact or enforce laws to prevent the pollution of the environment by extractive and manufacturing industries is a violation of the obligation to protect.

Obligation to Fulfil: The obligation to fulfil includes obligation to facilitate, provide and promote through appropriate policy, legislative and administrative processes. It requires the State to take positive actions to enable and assist people to enjoy human rights. For example, obligation to fulfil the right to education requires the State to build enough schools and employ qualified teachers who can respond to the needs of all children including the needs of vulnerable and marginalised children.

2.4. THE KENYAN BILL OF RIGHTS

The Constitution contains extensive and progressive bill rights. Moreover, the Constitution set out fundamental national values and principles of governance which bind all State organs, State officers and all persons whenever they apply or interpret the Constitution, make or implement public policy decisions. These national values and principles of governance enshrined in Article 10 include: democracy and participation of the people, equity, social justice, inclusiveness, equality, human dignity, human rights, non-discrimination, and protection of the marginalised.

The table below enumerates the Bill of Rights in brief

ARTICLE	RIGHT/FREEDOM PROTECTED
Article 26	Right to life.
Article 25	Equality and freedom from discrimination
Article 28	Inherent human dignity

ARTICLE	RIGHT/FREEDOM PROTECTED
Article 29	The right to freedom and security of the person,
Article 30	Right not to be held in slavery, servitude / perform forced labour.
Article 31	Right to privacy
Article 32	The right to freedom of conscience, religion, thought, belief
Article 33	The right to freedom of expression
Article 34	Freedom of the media.
Article 35	The right to Access to information
Article 36	The right to freedom of association
Article 37	The right to assembly, demonstration, picketing and petition
Article 38	Political rights (vote, form or join political party)
Article 39	The right to freedom of movement
Article 40	Protection of the right to property.
Article 41	The right to fair labour practices
Article 42	The right to a clean and healthy environment
Article 43	Economic and social rights
Article 44	The right to use the language, and to participate in the cultural life
Article 45	The right to family: right to marry a person of the opposite sex
Article 46	Consumer rights
Article 47	The right to fair administrative action
Article 48	The right to access to justice
Article 49	Rights of arrested persons
Article 50	Right to fair hearing
Article 51	Rights of persons detained, held in custody or imprisoned
Article 53	Rights of children
Article 54	Rights persons with disabilities
Article 55	Rights of the youths
Article 56	The rights of minorities and marginalised groups
Article 57	Rights of older persons

These rights and fundamental freedoms are also expressly recognized by the international bill of rights instruments and other international and regional conventions which Kenya has ratified.

2.4.1. Equality before the Law

Article 27 of the Constitution guarantees all persons equality before the law, and equal protection of the law. It also prohibits any discrimination under the law on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. It reads:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

The term ‘discrimination’ has been defined to imply any distinction, exclusion, restriction or preference which is based on any ground laid out in an instrument, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. However, the principle of equality sometimes requires States to take affirmative action in order to diminish or eliminate existing conditions which cause or help to perpetuate discrimination prohibited by the law. For example, Article 27(8) requires that not more than two-thirds of the members of elective or appointive bodies should be of the same gender. This provision intends to reduce gender disparity in governance by increasing women participation.

With regard to discrimination, the high court in, *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, stated that the constitution only protects against unfair discrimination. The court defined unfair discrimination as differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalisation.

2.4.2. Right to Human Dignity

Human rights scholars have argued that human dignity is at the centre of, and is the basis for recognition and protection of all human rights. Article 1 of the UDHR states, “All human beings are born free and equal in dignity and rights.” The preambles of both the ICCPR and the ICESCR recognize inherent dignity and equality as the foundation of freedom, justice and peace in the world. They similarly read in part:

“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”

Article 19 (2) of the Constitution stipulates that the reason for recognizing and protecting human rights and fundamental freedoms is “...to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.”

Furthermore, Article 28 provides that, “Every person has inherent dignity and the right to have that dignity respected and protected.”

2.4.3. LOCUS STANDI TO ENFORCE THE BILL OF RIGHTS

Article 22 of the Constitution grants any person or group survivor of a violation of any human right the standing to access court for appropriate remedy. They include:

- i. A person acting in their own interest
- ii. A person acting on behalf of another person who cannot act in their own name.
- iii. A person acting as a member of, or in the interest of, a group or class of persons.
- iv. A person acting in the public interest
- v. Association acting in the interest of one or more of its members

Articles 20(3) and (4) of the Constitution commit the Court to adopt the interpretation that

most favors the enforcement of a right or fundamental freedom and promotes the values that “underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.” Further, Article 259 provides that the Constitution must be interpreted in a manner that “...advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.”

The High Court has inherent original jurisdiction to hear and determine cases of human rights violation. Commissions such as the Kenya National Human Rights and Equality Commission and Commission on Administration of Justice have a mandate to investigate and address violations of human rights too. Regarding reparation for violations, Article 23(3) affords survivors of violations adequate recompense, which may take the form of:

- i. A declaration of rights
- ii. An injunction
- iii. A conservatory order.
- iv. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24.
- v. An order for compensation.
- vi. An order of judicial review.

2.5. LIMITATION OF RIGHTS

Article 24 of the constitution provides that a right or fundamental freedom in the Bill of Rights cannot be limited except by law. The limitation must be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. Moreover, a right can only be limited by a law, which must take into account all relevant factors, including:

- i. The nature of the right or fundamental freedom
- ii. The importance of the purpose of the limitation
- iii. The nature and extent of the limitation
- iv. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others
- v. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Primarily, the limitation law/clause should be to protect the rights of individuals rather than to permit the imposition of limitations by the government. Even persons convicted of criminal offences are entitled to the enjoyment of the fundamental rights and freedoms guaranteed under the Constitution, subject to the limitations provided by Article 51. Where

limitations are justifiably imposed, it should for a short duration and subject to review.

3.1. INTRODUCTION: WHAT IS A FAMILY?



CHAPTER THREE:

Family Law

The Black Laws Dictionary defines family as ‘a collective body of persons who live in one house and under one head or management. In the traditional African context, the family is much wider and includes distant relatives and other persons related through marriage. Members of one clan or even related clans are, in many instances, referred to as one family. Family is considered the core unit of society. In law, there are certain formal requirements that must be satisfied for a legal family to be created:

- a. There must have been a marriage ceremony of a certain kind or at least a situation that leads the law to presume a marriage. For instance, prolonged and continuous cohabitation.
- b. The marriage must have satisfied the requisite legal requirements.

Article 45 of the Constitution provides for the right of everyone to marry a person of the opposite sex. The Marriage Act regulates the formation of families through marriages, and dissolution through nullification, separation and divorce. The Matrimonial Property Act provides for division of matrimonial property after dissolution of marriage.

3.2. LEGAL REQUIREMENTS FOR A MARRIAGE

- a. Capacity
- b. Process

3.2.1. 3.2.1 Capacity

- a. Age 18 years
- b. Sound mind
- c. There should be no subsisting marriage that does not allow polygamy

3.3. TYPES OF MARRIAGES

Section 6 of the Marriage Act provides for different types of marriages in Kenya. These are Christian, civil, African customary, Islamic, and Hindu marriages. In addition to general requirements such as the fact that parties must be biologically male and female, specific rules regulate the rights and responsibilities of people entering into marriages under each of these systems.

3.3.1. Christian Marriages (Part III of the Marriage ACT)

Christian marriages are contracted in accordance with the rites of a Christian denomination. They are strictly monogamous.

A. Process

- i. The parties intending to marry must issue a written notice of intention to marry to the Registrar of marriages and the church minister in charge of the place of worship

where the marriage would be celebrated. The notice must be for not less than 21 days and not more than 3 months.

- ii. A person may object to the intended marriage by giving a written notice to the person in charge of the place of worship where the notice of intention to marry has been posted.
- iii. The person in charge of a place where the marriage is to be celebrated shall hear the objection forthwith, and make a determination of the objection within a reasonable period which shall not be more than 7 days after the hearing of the objection.
- iv. Any party who is dissatisfied with the decision of the person in charge of a public place of worship may appeal to the court within 14 days of the decision.

B. Celebration and marriage certificate

During the marriage ceremony (wedding) the person officiating (church minister) completes and signs a marriage certificate in triplicates. The parties to the marriage and 2 witnesses also sign the marriage certificate. The church minister retains one copy of the certificate; the other copies are issued to the parties and the Registrar of marriages respectively.

3.3.2. Civil Marriages (Part IV Marriage Act)

The procedure of contracting a civil marriage is similar to the one of Christian marriages except civil marriages are celebrated by the Registrar of marriages in the place of a church minister.

3.3.3. Customary Law Marriages (Part V Marriage Act)

Marriages contracted in accordance with the customs of the community of one or both parties to the marriage. For instance, where the applicable custom requires payment of dowry to prove a marriage, the payment of a token amount of dowry is sufficient to prove a customary marriage. Customary marriages are polygamous or potentially polygamous.

Registration: Parties to a customary marriage are obligated to notify the Registrar of marriages within 3 months of completion of the relevant customary ceremonies. The notice contains a written declaration by the parties confirming that all requirements are met, witnessed by 2 adults who played a key cultural role in the celebration of the marriage.

NOTE: Under section 8 of the Marriage Act, a customary law marriage can be converted from being a potentially polygamous marriage to a monogamous marriage if each spouse voluntarily declares the intent to make such a conversion, and at the time of the conversion the husband has only one wife.

3.3.4. Hindu Marriages (Part VI Marriage Act)

Marriages contracted by persons who profess the Hindu religion and celebrated in accordance with the Hindu religious rituals. They are officiated by a person authorized by the registrar.

3.3.5. Islamic Marriages (Part VII Marriage Act)

Marriages contracted by persons who profess the Islamic faith in accordance with the Islamic law. They are officiated by a kadhi, sheikh or imam authorized by the Registrar of

marriages.

Note: According to Section 49(3), provisions of the Marriage Act which are inconsistent with Islamic law and practices do not apply to persons who profess the Islamic faith.

3.4. DISSOLUTION OF MARRIAGES

3.4.1. Nullification CASES

In addition to lack of capacity, a marriage can be declared a nullity if the following things are proved:

- i. Failure to consummate, where either the husband or the wife has refused to consummate, or is permanently impotent and or incapable of consummating the marriage through sexual intercourse.

In *D F v P B S* The marriage was solemnised on 21st October, 2016 at the office of the Registrar of Marriages in Malindi. The reason for seeking annulment of the marriage was non-consummation. The petitioner averred that immediately after the celebration of the marriage a row erupted between him and the Respondent which led to physical confrontation. As a result, he was forced to stay away and keep distance from the Respondent. Further, as a result of the altercation on the first night of their marriage, differences arose between them leading to the non-consummation of their marriage. He thus urged the court to annul their marriage.

In granting the decree, the learned judge W. Korir noted that the petitioner had met the requirements for annulment wherein he made reference to sections 73 and 74 of the Marriage Act (2014) which provide as follows:

- a. *A party to a marriage may petition the court to annul the marriage on the ground that the marriage has not been consummated since its celebration; and that the court will only grant a decree of annulment if the marriage has not been consummated since the petition was made to the court (s.73(1)(a) & 73(2)(c)); and*
- b. *“where a petitioner alleges the willful refusal of one party to consummate the marriage, the petition may not be presented by the party against whom the allegation is made.” (s.74(3))*

- ii. If the spouses are within the prohibited degrees of relationship, i.e. sister and brother and were not aware of it at the time of the marriage.
- iii. If at the time of the marriage and without the knowledge of the petitioner, the spouse suffers recurrent bouts of insanity as certified by a qualified medical doctor.
- iv. If at the time of the marriage, and without the knowledge of the petitioner, the woman is pregnant by another man other than the petitioner.

- v. If the petitioner’s consent was not freely given.
- vi. If a party to the marriage was absent at the time of the celebration of the marriage.
- vii. If there is a previous subsisting marriage (where one of them is married under a system that does not allow polygamous unions) and the petitioner was ignorant of that fact at the time of the marriage.

Note: Nullification of a marriage means it is deemed not to have happened. The nullification petition must be made within one year of the celebration of the marriage.

In *C B G v J L W* the learned judge L.A Achode made reference to section 73 of the Marriage Act of 2014 which stipulates that

“the court shall only grant a decree of annulment if the petition is made within one year of the celebration of the marriage.”

She further went on to state that for the court to grant a decree of annulment there was need for the petitioner to prove that at the date of marriage, he/she was not aware that they were in a prohibited relationship or that the other party was married to another person.

3.4.2. Divorce

Divorce is the legal dissolution of a marriage. The party seeking to divorce files a divorce petition in a magistrate’s court setting out the grounds for the divorce. Section 66 of the Marriage Act requires that before filing a divorce petition to dissolve a civil marriage, the parties must have been married for at least 3 years, unless the petitioner can prove that the marriage poses certain exceptional hardships. The court has however declared this provision unconstitutional.

Grounds for divorce: The grounds for divorce for all types of marriages are generally similar with slight variations. Irretrievable breakdown of the marriage is the main ground which can be proved by any of the following grounds:

- i. **Adultery:** Adultery is defined as consensual sexual intercourse between a married person and a person of the opposite sex, whether married or unmarried, other than the spouse during the existence of the marriage. It must be proved that sexual intercourse took place and that it was voluntary (not rape).

In the case of *DM -vs- JM* the late Justice Chesoni had this to say regarding Adultery: *“... that the evidence required to establish adultery must be more than the mere suspicion and opportunity: evidence of a guilty inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish Adultery.”*

- ii. **Cruelty:** Any act that leads to or is likely to lead to injury to the petitioner’s physical or mental health is an act of cruelty. The cruel conduct should be injurious that continued cohabitation between the spouses is impossible. It must be distinguished from the ordinary “wear and tear” of married life.

In *DM v TM* Chesoni J stated that: “To establish cruelty the complainant must show

to

the satisfaction of the court: – misconduct of a grave and weighty nature; real injury to the complainant's health and reasonable apprehension of such injury; that the injury was caused by misconduct on the part of the Respondent, and; that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word”.

In **C B G v J L W** the learned judge noted the following with regard to cruelty: “Divorce on grounds of cruelty will be granted upon proof that the acts of cruelty were not mere trivialities but were such that were likely to cause harm not only to the physical health but also mental health.”

Cruelty was further considered by Justice Kariuki in the case of **AMA vs GSB** wherein he held:

“..... cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb, or health, bodily or mental or so as to give reasonable apprehension of such a danger....”.

- iii. **Desertion:** This is unjustifiable withdrawal of one spouse from cohabitation with the other for at least 3 years without his or her consent, and with intention of remaining permanently separated. It does not need to be physical desertion. For instance, it amounts to desertion where a spouse moves out of the matrimonial bed for the mentioned period.

In **ENC v SNK** the Petitioner accused the Respondent of neglecting her and their child, denial of conjugal rights, adultery, constructive desertion, coming home drunk at late hours, being abusive and disorderly and of bad temper and lack of common intention to sustain the marriage leading to separation for 2 years prior to the filing of the Petition. She averred that the acts of cruelty and desertion have caused her embarrassment, mental torture and anguish. She longer has any love for the Respondent and cannot remain married to him. The marriage has therefore irretrievably broken down.

The learned judge M. Thande noted as follows while granting the order of *decree nisi*: “*This is a marriage that appears to be on paper only, the same having irretrievably broken down on account of the Petitioner's desertion. The desertion has no doubt occasioned mental and emotional anguish and pain upon the Respondent. I am therefore satisfied that the grounds for dissolution of the marriage have been established.*”

- iv. **Life imprisonment of one spouse:** Where a spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more.

In **D K M v R N M S.J Chitembwe** noted that a marriage would be dissolved where the court deems it to have irretrievably broken down and that imprisonment of one of the parties to a marriage for life or a period in excess of seven years would amount to irretrievable breakdown of the marriage.

- v. **Insanity:** Where a spouse suffers from incurable insanity confirmed by two doctors, at least one of whom is qualified or experienced in psychiatry.

In **P J K v O K K E.M Muriithi** succinctly noted that a marriage is deemed to have irretrievably broken down where a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the Respondent in the light of existing medical knowledge. He further noted that in such an instance the court would be left with no other option but to dissolve the said marriage.

- vi. **Exceptional depravity by the other spouse:** For instance, where a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition.

In **HMN v JAN M.** Thande succinctly noted that *both parties have caused exceptional depravity to each other in that they have not lived together since 2004 and have had no communication or conjugal relations for that period.*

3.4.3. Presumption of Death

If a spouse has reason to believe that his or her spouse is dead, he or she may present a petition to the court to presume the missing spouse dead and dissolve the marriage. Such a petition can only be presented if the spouse has been missing for at least 7 years.

3.5. SPOUSE MAINTENANCE DURING DIVORCE

During the pendency of divorce proceedings, a spouse may apply for interim maintenance (known as alimony in *pendente lite*) from the spouse. This maintenance lasts until divorce is granted. In such an application, the applicant must prove her needs through a sworn affidavit, and state her income, if any. A party aggrieved by the maintenance orders may apply to court for variation.

3.6. DIVISION OF MATRIMONIAL PROPERTY

The Matrimonial Property Act is the main statute that governs ownership and division of matrimonial property. As a general rule, marriage does not alter existing property rights. Women and men have equal rights to own property. Any property acquired before the marriage belongs to the person who had acquired it, unless the owner executes a prenuptial

agreement giving the spouse rights to the property.

Article 45(3) of the Constitution states 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.”* On the other hand, Section 7 Matrimonial Property Act provides that *“ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”*

This seemingly discrepancy between the Constitution and the Matrimonial Property Act is a contentious subject which has been the subject of litigation in **Federation of Women Lawyers Kenya (FIDA) v Attorney General & Another** herein John M. Mativo succinctly stated as follows: *“Article 45 (3) of the Constitution treats parties to a marriage as equal partners. That equality is reflected in the provisions of the act which recognize that the contribution of parties to a marriage whether monetary or non-monetary will be treated equally. The same equality is maintained by section 7 of the act which provides that upon dissolution of a marriage, parties are entitled to a share of the property equal to their contribution whether monetary or non-monetary. The Petitioner’s fear as I understood it is that it is difficult to prove non-monetary contribution. I do not think so. Section 2 of the act defines contribution in very clear terms. All that a party is required to do is to provide evidence on details of his or her non-monetary contribution in the marriage and leave it to the Court hearing the dispute to determine. I have no doubt that the Court will rise to the occasion and in the circumstances of the individual case, apply the evidence, the law and appropriate legal skills and arrive at a fair determination of the valuation of the non-monetary contribution in the circumstances of the case under consideration, and determine the respective rights of the parties in the case. That, our Courts are capable of doing.”*

In his concluding remarks at paragraph 65 he noted as follows: *“It is my conclusion that the impugned section (section 7 of the Matrimonial Property Act) does not offend any of the provisions of the Constitution as alleged, nor does the section contradict any of the provisions of the act.”*

Discussing the same provisions, the High Court of Kenya in **UMM vs IMM** rendered itself in the following words: *“I take the view that at the dissolution of the marriage each partner should walk away with what he/she deserves. What one deserves must be arrived at by considering her/his respective contribution whether it be monetary or non-monetary. The bigger the contribution, the bigger the entitlement. Where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality*

contemplated by Article 45(3)”

Contribution can either be financially, emotional and psychological support. A spouse who claims the property of the other has to show by evidence that he or she contributed to the acquisition of that property substantially, directly, or indirectly. For example, through paying for household expenses, preparing food, and enhancing the general welfare of the family.



CHAPTER FOUR:

Succession

4.1. INTRODUCTION

The Law of Succession Act is the basic law on matters of succession. There are two main types of succession, testate and intestate succession.

4.2. TESTATE SUCCESSION

Testate succession happens where the deceased leaves a will, in which he/she makes arrangements on how his or her property should be disposed of after he or she dies.

4.2.1. Advantages of a Will

Minimises squabbles and protracted disputes over property after one's death.

- i. It gives the maker the freedom to decide who should inherit their property and how.
- ii. It gives the maker an opportunity to decide who will run the affairs of his or her estate instead of the management falling in the hands of people in whom he or she would probably have had little confidence
- iii. The executor of the estate derives power from the will and can begin managing the affairs of the estate earlier than an administrator who has to wait until letters of administration are granted.

4.2.2. Validity of a Will

For a will to be valid:

The maker must have the capacity to make a will. Children and persons of unsound mind have no capacity (Section 5).

In John Kinuthia Githinji v Githua Kiarie and others The deceased, who was admitted in hospital seriously ill with cancer of the duodenum, sent for her advocate whom she gave instructions to draw a will the details of which consisted of how she wished her property to be disposed of. The advocate drew the will in accordance with the instructions and thereafter explained its contents to the testatrix in the hearing of a nurse on duty. At the time of execution, she was said to be mentally alert and appeared to understand the advocate's explanations of what was contained in the will. Consciously and knowing what she was doing, the testatrix executed the will by signing it. It was held that in the absence of evidence that the illness had affected her mind so as not to know what she was doing when she signed the will, the subject will was valid.

- i. **Gicheru JA** that it is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents: for where a will, rational on the face of it, is shown to have been executed and attested in the manner prescribed by law it is presumed, in the absence of any evidence to the contrary, to have been made

by a person of competent understanding; but if there are circumstances in evidence, which counterbalance that presumption, the decree of the court must be against its validity.

- ii. It must satisfy the formal requirements for a written will or oral will as the case may be.

4.2.3. Oral Wills (Section 9)

An Oral will is valid only if:

- i. It is made in the presence of 2 or more competent witnesses.
- ii. The maker dies within 3 months of making it. Except for members of the armed forces or merchant marine who makes an oral will and dies during a period of active service.
- iii. It is not contrary to any unrevoked written will of the testator made before or after the date of the oral will.

4.2.4. Written Will (Section 11)

Formal requirement for a written will are:

- i. Must be signed by the maker and at least two competent witnesses who saw the maker signing the will.
- ii. The testator can also donate powers to another competent person to sign on his behalf and in his presence.

4.2.5. Circumstances under which Court can Invalidate a Will

- i. If it is proved that the person making it lacked the capacity to make it at the time when it was made.

In the Matter of the Estate of James Ngengi Muigai (Kooome J), the testator was dementing and physically incapacitated due to joint pains and hypertension at the time of making the will. The witnesses who attested the will testified that the deceased looked normal. The court was satisfied that he was of sound mind as the objectors had failed to prove unsoundness of mind at the time of the execution of the will. That is, unless it is proved that at the time of executing the will he is of unsound mind occasioned by mental or physical illness, drunkenness or other cause to make him not know what he is doing, the testator is presumed to be of sound mind.

In Mbugua v Mbugua Chesoni Ag JA emphasised that a testator must be of sound mind and he must not at the time of giving his instructions be drunk, insane, or otherwise incapable of making a valid will.

- ii. If it lacks the validity requirements for either an oral will or a written will.
- iii. If it is proved that it was made under circumstances that raise suspicion of fraud or undue influence on the maker.

In Wanjau Wanyoike and four others v Ernest Wanyoike Njuki Waweru and another The deceased died at age ninety, three days before his death he had made a codicil to his will, which had been made two years earlier. The codicil substantially altered the terms of the original will, resulting in a substantial benefit to the first respondent, a grandchild of the deceased. Evidence showed that at the time of the alleged execution of the codicil the deceased was bedridden, sick and paralyzed and he appeared to be in no mental or physical condition to comprehend or even give instructions for the making of a will. The court considered the age of the deceased, the fact that he died three days after the making of the codicil and the fact that it was the first respondent who did everything in relation to the codicil and benefited most under it, in deciding that the circumstances excited suspicion. The first respondent claimed the deceased dictated the terms of the codicil and that he noted them down and gave them to the advocate who drafted the will. The court concluded that the deceased did not know nor approve the contents of the codicil, and the same was therefore void.

In the Matter of the Estate of James Ngengi Muigai undue influence was alleged in the matter because it was the eldest son of the deceased who suggested that he should write a will and got the family priest to convince the deceased to make the will. The objectors also pointed out that the deceased was living in the house of the said eldest son and therefore the eldest son must have driven the deceased into making the will in the manner he made it. The court was not convinced that the eldest son had exercised undue influence on the deceased as the deceased had previously donated a power of attorney to the son to act on his behalf during his lifetime. The deceased was convinced by a respected citizen, a family priest, to write the will. The advocate who drafted the will visited the deceased three times to discuss the will, and that it was normal for an elderly person to live with their eldest son.

In *Elizabeth Kamene Ndolo v George Matata Ndolo* the Court of Appeal stated that the charge of forgery or fraud is a serious one, the standard of proof required of the allegor is higher than that required in ordinary civil cases, that is proof upon a balance of probabilities, but certainly not beyond a reasonable doubt as in criminal cases. In that matter the Court of Appeal held that the eyewitness evidence of attesting witnesses was preferable to that of the handwriting experts, which really is only opinion evidence.

In the **Matter of the Estate of James Ngengi Muigai** The allegedly forged will was submitted to the Criminal Investigations Department at the request of the objectors following a criminal complaint. The document was subjected to an examination and the alleged forged signature of the deceased was compared with the deceased's known signatures. The expert document examiner concluded that the signature on the document was that of the deceased. The court held that the will was not a forgery.

- iv. If it is proved that a clause or word was introduced by mistake.
- v. If it is proved that it was written for the maker but it was not read to him or her before he or she signed it.
- vi. Beneficiaries are witnesses.

4.2.6. Revocation of Will

A will can be revoked by the maker in the following ways and circumstances:

- i. If the maker destroys it, through tearing, burning or otherwise, showing a clear intention to revoke it.
- ii. If the maker writes another will or *codicil* (an amendment or addition to the will) (section 18).
- iii. If the maker marries after making a will, unless it can be proved that it was made in contemplation of the marriage with a specified person (section 19).
- iv. If it is known that a will was written but cannot be found after the death of the maker.
- v. If the maker does not make reasonable provision for his or her dependents, including children that he was taking care of before he died, even if they were from a bigamous union or if he or she was not married to their mother or father.

Note: A will that has been revoked may be revived by re-executing it or by a codicil that shows a clear intention to revive the revoked will (section 21).

4.2.7. Recourse for Dependants Left out of the Will

Under section 26 of the Law of Succession Act, a dependant who is left out or not adequately provided for in the will can apply to court for a reasonable provision to be made for him or her out of the deceased's net estate, as the court may find fit. Section 29 defines a dependant to include "*wife, wives, former wife or wives, children of the deceased, and anyone else who was being maintained by the deceased immediately prior to his death*".

In **James Maina Anyanga vs. Lorna Yimbiha Ottaro & 4 others** The court held that: 'Failure to make provision for a dependant by a deceased person in his will does not invalidate the will as the court is empowered under Section 26 of the Law of Succession Act to make reasonable provision for the dependant.'

In **Elizabeth Kamene Ndolo v George Matata Ndolo** The court stated as follows: "*This section clearly puts limitations on the testamentary freedom given by section 5. So that if a man by his will disinherits his wife who was dependent on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family's only home and makes no reasonable provision for his children who were dependent on him during his lifetime, the court*

may well follow the mistress, under section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for."

Akiwumi JA, in **John Gitata Mwangi & 3 others v Jonathan Njuguna Mwangi & 4 Others**, observed that: *"In order that the court may be enabled to come to a proper conclusion as to what order it should make, a dependent has the duty to give satisfactory evidence as to his past, present or future capital or income and his existing and future needs. Without this, the court will not be able to make any sensible order. Whether the deceased has made any advancement to the dependant and the circumstances of the deceased's other dependents are also factors to be considered. The general circumstances of the case including the deceased's ascertainable reasons for not providing for the dependent must also be considered. Which of these factors will play a vital role in their combined effect, depends on each particular case."*

4.2.8. Administration of a Will

The executor of a will should apply to court for formal recognition of the will by the court. The document issued by court is known as probate. Where the will is contested, probate will not be granted until the matter is resolved.

4.3. INTESTATE SUCCESSION

Intestate succession arises where someone dies without a will. It can be absolute or partial intestate where the deceased failed to include all of his or her property in a will. In the case of partial intestacy, the property not covered by the will is distributed in accordance with intestacy rules. The Law of Succession Act makes provision for both monogamous and polygamous intestacy.

4.3.1. Monogamous Intestate

It is provided for under sections 35, 36, 37 and 39 of the Law of Succession Act. Where the intestate leaves a spouse and a child or children, the spouse is entitled to the personal and household effects plus an interest as long as he or she lives in the remainder of the estate, and as long as, if she is a widow, remains unmarried. Upon death or remarriage of the surviving widow, the property is divided amongst the surviving children equally. The surviving spouse may also distribute the estate while she/he is still alive or unmarried, as long as it is done fairly and reasonably. Any aggrieved child is entitled to petition the High Court for a variation or redistribution.

Where the intestate leaves a surviving spouse but no children, the surviving spouse is entitled to the personal and household effects of the deceased absolutely and the first ten thousand shillings out of the residue of the net intestate estate, or 20% thereof, whichever is greater; and a life interest in the whole of the remainder of the estate.

The Law of Succession Act
makes provision for both monogamous
and polygamous intestacy.



If the surviving spouse is a widow, such life interest is determined upon her re-marriage to any person. Where an intestate leaves a surviving child or children but no spouse, the net intestate estate devolves upon the surviving children and is equally divided among them. Where an intestate leaves no surviving spouse or children, the estate devolves to his/her relatives starting with the father, mother, brothers and sisters, nieces and nephews, step-siblings or other relatives in the nearest degree of consanguinity. If there is no relative, the property reverts to the State.

4.3.2. Polygamous Intestate (section 40)

Where the deceased was polygamous, the personal and household effects and the rest of the property is divided among the spouses and children. For instance, if there are two surviving wives, one with 3 children and the other 5 children, the estate would be divided into 10 equal parts, each per child, and the wives. Children inherit from their mother upon death or remarriage. Where a widow has no children, she will be entitled in the same manner as a widow whose husband has died intestate.

4.3.3. Succession Rights of the Other Woman

Sections 3(5) and 29 Law of Succession Act recognize all women married to a deceased husband as wives, including former wives. Section 3(5) concerns women customarily married to the intestate husband even where the deceased had contracted a previous or subsequent monogamous marriage.

In the **matter of the estate of Reuben Nzioka Mutua** (Deceased) Aluoch J. held that:

“section 3(5) of the Law of Succession Act caters for women under customary conditions by men who had previously or subsequently contracted statutory marriages, and who have been abandoned or neglected, and such women are entitled to be provided for the estate of the deceased.”

However, in the case of **Irene Njeri Macharia v. Margaret Wairimu Njomo and another** Justices Omolo, Tunoi and Bosie overturned the ruling In the Matter of Reuben Nzioka Mutua (deceased) and held that section 3(5) of the Law of succession Act is meant to protect women who marry men under customary law, who are already married to or who subsequently marry another women under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding that by virtue of section 37 of the Marriage Act the man had no capacity to marry her.

The justices were keen on their ruling lest they validate bigamy hence sec 3(5) recognizes such marriage ...for succession purposes. This is buttressed by the last leg of section 3(5) ...or subsequent monogamous marriage to another woman nevertheless a wife for the purpose of the Act, and in particular sections 29 and 40 thereof and her children within the meaning of the Act.

According to Justice Aluoch in the **Matter of the Estate of Reuben Nzioka Josephine** was not a wife within the meaning of section 3(5) of the Act. Only the children (who were minor applicants) were the deceased children under section 3 of the Succession Act and section 29 of the Act. Therefore, Josephine could sneak in to benefit from the inheritance under Section 3 of the Act as the mother of the minors.

Justice Aluoch leaned mostly on the so called operative word rather than reading the whole Section 3(5) in toto to construe the mischief. Nevertheless, her ruling was overturned by the Court of appeal in another similar case and therefore binding. Section 3(5) should not be read in isolation with section 29 and section 40 of the succession Act.

4.3.4. Succession Rights of Children Born out of Wedlock

Section 3(2), (3), (5) and 29 Law of Succession Act guarantee all children of the deceased entitlement to inherit. Children born out of the wedlock are entitled to inherit the estate of the deceased father on the same terms as the biological children, if the deceased had expressly recognized or accepted them as children of his own or had voluntarily assumed parental responsibility.

In **NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another** J. Njagi declared *sections 3(2) and 3(3) null and void on the basis that it was unconstitutional. He stated as follows: “Section 3(2) and 3 (3) of the Law of Succession Act, are inconsistent with the Constitution in so far as a ‘child’ born out of wedlock is regarded as such if the father.... has expressly recognized or in fact accepted as a child of his*

own or for whom he has voluntarily assumed permanent responsibility’. As stated before, a parent’s responsibility to their child is mandatory and not discretionary. This section is in contravention of Article 53 (1)(e) which requires parents to provide for their children whether they are married or not.”

4.3.5. Administration of the Estate of an Intestate

Upon the death of a person intestate, the most well placed person in the succession line should apply for grant of letters of administration. The court first issues temporary letters which are confirmed after a period of about 6 months. It is an offence punishable by law for anyone to administer an estate without letters of administration. Where it is proved that a grant of letters of administration was obtained through fraud, it will be annulled and the property will revert to the rightful person in the succession line.

Note: The Law of Succession Act, Probate and Administration Rules provide further details on documentation and process of administration of testate and intestate succession.



CHAPTER FIVE:

Gender Based Violence

Gender based violence is violence directed at a person by reason of their gender. It ranges from spouse beating, female genital mutilation, rape, defilement and murder.

5.1. ADVICE TO A SURVIVOR OF GENDER BASED VIOLENCE

- i. **Take action:** Advise the survivor to do something to protect herself from similar attacks. For instance, in case of wife beating, advise the survivor to go to a safe place such as a relative's house or a rescue house until the matter is procedurally resolved.
- ii. **Get medical help:** If there are injuries, advise survivors to seek medical attention as soon as possible, and to keep the medical records safely since they may be required as evidence when the attacker is charged in court.
- iii. **Make a complaint to the police:** Advise the survivor to make a complaint to the police. A threat to violence, physical assault and all other kinds of gender based violence consist of criminal offences punishable by the law. Sometimes police may decline to record the complaint or to arrest the perpetrator arguing that they cannot interfere in family quarrels or by trivialising the injuries. Educate the survivor that it is the obligation of the police to record statements and arrest perpetrator and is not a favour. In case of difficulties or the survivor is intimidated, accompany her to the police station. After the matter is taken to court, assist the survivor to follow up until the conclusion of the case.
- iv. **Seek counselling:** Refer the survivor to a free or affordable counselling centre. A number of civil society organisations in Kenya provide free counselling services to survivors of gender based violence
- v. **Seek a restraining order:** To stop further violence against the survivor, advise and assist her to apply for a restraining order against the spouse. A restraining order may be for threat of violence or actual violence, or a wider one where the spouse is restrained from accessing the matrimonial home for a certain period of time i.e. pending the conclusion of a case between the two. For example, In the case of **Marianne Jebet Kitany -v-Franklin Mithika Linturi**, Hon I. Orenge issued restraining orders against Linturi (Senator) as follows: *"The senator is restrained from physically or sexually abusing or threatening to abuse the applicant, the applicant's staff, their six children and any other person associated with the applicant, further restrained from engaging or threatening the applicant and or the children, Intimidating, harassing, stalking or engaging in any behaviour which amounts to emotional, verbal or psychological abuse"*
- vi. **Judicial separation:** A survivor of domestic violence can seek judicial separation, whether the marriage is customary or statutory. Judicial separation allows the spouses to live separately. The court may order the husband to pay maintenance to the wife during the period of separation. Unlike divorce, judicial separation does not dissolve a marriage and neither party can remarry.

- vii. **Obtain a divorce:** A survivor of domestic violence may file for divorce on the ground of cruelty. Divorce permanently dissolves the marriage and parties are free to remarry. The court will also make an order on division of matrimonial property, custody and maintenance of children.

Note: In practice, Divorce, division of matrimonial property, and custody and maintenance of children are three separate proceedings.

5.2. SEXUAL OFFENCES

5.2.1. Rape

Rape is defined in section 3 of the Sexual Offences Act (SOA) as the *"intentional and unlawful penetration of another with one's sexual organs, without the consent of the survivor or where the consent is obtained by force."* Under section 10 SOA, where the accused acts in concert i.e., where there is a joint intention with others for the purpose of rape or defilement, whether the others actually rape, the offence is gang rape. The penalty for rape is a minimum of ten years, and a maximum of life. For gang rape, the minimum sentence is fifteen years.

In *Livingstone Asirika v Republic*. Livingstone Asirikwa the appellant was charged with the offence of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count of committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act No. 3 of 2006. The court defined gang rape as under section 10 of the SOA as *"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."* The same Act defines a gang to mean two or more persons. The court went further to examine the elements of rape as provided for under section 3 of the SOA wherein it noted that:

1. A person commits the offence termed rape if:
 - a. *he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;*
 - b. *the other person does not consent to the penetration; or*
 - c. *the consent is obtained by force or by means of threats or intimidation of any kind.*

The court was therefore satisfied that the trial magistrate arrived at the correct decision in convicting the appellant. The court further stated that in sentencing, the minimum sentence for gang rape under section 10 of the SOA is 15 years' imprisonment which may be enhanced to life imprisonment.

5.2.2. 5.2.2 Defilement

Defilement is penetration of a person below the age of eighteen. Section 8 SOA requires the prosecution to prove the age of the survivor before any conviction can be sustained. Consent is not a factor in this offence as the law presumes a child incapable of consenting to sex. The penalty for defilement depends on the age of the survivor. Where the survivor is below 11 years, the penalty is life imprisonment; between 12 and 15 years, the minimum term is twenty years; between 16 and 18 years, the minimum term is fifteen years.

In **Vincent Kadasia & Another v Republic**. The appellant was convicted for the offence of defilement contrary to section 8 (1) (3) of the Sexual Offences Act No. 3 Of 2006. The particulars were that he intentionally and unlawfully caused his penis to penetrate the vagina of the victim, a child aged 15 years without her consent and he was sentenced to serve twenty years' imprisonment. They were aggrieved and filed an appeal against both conviction and sentence. *The court stated that it was immaterial whether or not a child to a sexual congress had given consent. Any child under the age of 18 years lacks capacity to give consent. All that the prosecution was required to do, which they had done in this case was to prove that there was penetration; that the accused was the perpetrator and that the victim's age was below 18 years.*

In **Fappyton Mutuku Ngui vs. Republic** the learned Judge Joel Ngugi stated: *"Going by the definition of defilement, the issues which the court needs to determine are: whether there was penetration of the complainant's genitalia; whether the complainant is a child; and finally, whether the penetration was by the Appellant."*

In the case of **Musyoki vs. R** it was stated that *"Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. On that basis, the high court found that the complainant's age was properly ascertained through the evidence of PW3, the mother of the complainant and her grandmother."* In this regard, it is the position in law that medical evidence is not the only evidence that can prove defilement. The same can also be proven by oral or circumstantial evidence.

5.2.3. Indecent Assault

Section 2 SOA defines Indecent act as *"an unlawful intentional act which causes (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration; (b) exposure or display of any pornographic material to any person against his or her will"* The penalty for indecent acts is provided for under sections 6, 11 and 11A.

The penalty for defilement depends on the age of the survivor.

Where the survivor is below 11 years, the penalty is life imprisonment



In *Stephen Oluoch Onyango v Republic*: The appellant was convicted for the offence of attempted defilement contrary to section 9 (1) and (2) of the SOA. The particulars of the offence are that he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of CKO, a child aged 6 years and was sentenced to serve ten years' imprisonment. He was aggrieved and filed this appeal against the sentence that though legal it was harsh. The evidence that was presented by the victim was that the accused had removed his clothes. He did not remove the victim's clothes and he wanted to urinate on their face. The court stated that for an act to constitute an attempted offence, it must be more than a preparatory act and must pass the "but for" test. In the analysis of evidence, the court found that the evidence on record did not prove the offence of attempted defilement. However, the evidence on record proved beyond reasonable doubt the offence of committing an indecent act with a child contrary to section 11 (1) of the SOA. Therefore, the conviction was quashed and the sentence imposed by the learned trial magistrate was set aside and the appellant convicted for the offence contrary to section 11(1) of the SOA.

In **Mohamud Omar Mohamed v Republic**: The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Sub-section 8 (3) of the SOA and sentenced to life imprisonment. The particulars of the charge were that the appellant had intentionally caused his male genital organ to penetrate the female genital organ of a child aged 8 years. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the SOA. He was aggrieved by the conviction and the sentence and filed the instant appeal. The court stated as follows: "Having established that there were doubts as to whether there was actual penetration there was need to examine whether the appellant ought to be convicted of the alternative charge, which is committing an indecent act with a child." It was therefore held by the court that the evidence on record was consistent with the commission of the alternative offence of committing an indecent act with a child.

5.2.4. Marital Rape

The Sexual Offences Act provides that a husband cannot rape his wife. This position is, however, subject to debate and challenge.

In the case of **Esther Nangwana Nandi v Jones Chewo Bobo**, the court in granting a divorce noted that marital rape was an affront to the liberty of the woman and threatened the life and the health of the plaintiff. The presiding judge noted that sexual violence cannot be allowed as part of wear and tear of marriage life. The court further stated that marital rape amounts to cruelty and thus a ground for divorce, with or without recognition of the same under Kenya's criminal law.

5.2.5. Rights of a Survivor of Sexual Assault

- i. **Confidentiality:** All the information given to the police and the legal aid provider is confidential. It should not be disclosed to third parties or media without the express written consent of the survivor.
- ii. **Respect:** A survivor of sexual assault has a right to be treated with respect. During the questioning the police and or the legal aid provider should give her due respect, and avoid unnecessary humiliating questions.
- iii. **Privacy:** Whether at the police station, or at the legal aid clinic, a survivor of sexual assault should be provided private space to tell her story.
- iv. **Police officer of the same gender:** A survivor of sexual assault has a right to tell her story to a police officer of the same gender. Most police stations have special desks to attend to complaints of gender-based violence and sexual offences.
- v. **Companion:** During the reporting, the survivor has a right to have a relative, friend or counsellor or even a lawyer during the questioning by police, if she so wishes.
- vi. **Preparation and support throughout the case:** The legal aid provider should support the survivor throughout the life of the case, during court appearances, preparing the survivor on what to expect during the different stages of the process, especially the potentially embarrassing experience at the hearing stage. If the survivor is afraid and intimidated by the court processes, advise her to request the court to allow her testimony to be heard in private, where the members of the public are asked to leave the courtroom.

Note:

- i. The violation and failure by duty bearers to ensure GBV survivors enjoy the above rights during reporting, investigation and court processes contribute to many survivors failing to report violations or to abandon the legal processes midway.
- ii. It is the obligation of the police officer in charge of investigation of the case to provide the survivor of gender-based violence with all the necessary documents including the occurrence book number (OB Number), and P3 form. The medical facility/s where the survivor is treated should issue post-rape care form and treatment notes.
- iii. It is the duty of the survivor to preserve evidence which has not been surrendered to the police, attend court, tell their story truthfully, and follow up on the case together with the legal aid provider till conclusion.



CHAPTER SIX:

Rights of Children

Who is a Child?

The Children Act defines a child as “a human being under the age of eighteen years.” This definition corresponds with that of the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child. Children rights are part of the wider human rights.

6.1. LEGISLATIVE FRAMEWORK FOR THE RIGHTS OF CHILDREN

1. The Constitution

The foundation of children rights in Kenya is anchored under Article 53 of the Constitution which provides:

53 (1) Every child has the right—

- a. to a name and nationality from birth;*
- b. to free and compulsory basic education;*
- c. to basic nutrition, shelter and health care;*
- d. to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;*
- e. to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and*
- f. not to be detained, except as a measure of last resort, and when detained, to be held—*
 - i. for the shortest appropriate period of time; and*
 - ii. separate from adults and in conditions that take account of the child's sex and age.*

(2) A child's best interests are of paramount importance in every matter concerning the child.

2. The Convention on the Rights of the Child

CRC is the authority on children rights at the international level. It was the first instrument to identify distinct rights of children.¹ All States are signatories to the CRC except Somalia and the United States of America. The Convention comprehensively deals with civil, political, economic, social and cultural rights of children throughout the world.

3. The African Charter on the Rights and Welfare of the Child

African Charter on the Rights and Welfare of the Child (ACRWC) adopts an African perspective to children rights. Unlike the CRC that deals exclusively with children rights, ACRWC gives the child both rights and obligations. The Charter emphasises protection and strengthening of the family unit as a basis of protecting children. Cultural and traditional practices that violate the rights of children are outlawed while those that protect children rights are encouraged. The ACRWC in certain respects provide wider protection than the CRC. For example, the Charter raises the age at which a child may be recruited into armed forces or take direct part in hostilities from 15 years as provided in the CRC, to 18 years.

6.2. THE CHILDREN ACT

The Children Act comprehensively addresses the rights of children in line with the CRC and ACRWC. The Act explains the general roles and responsibilities of the government and parents in ensuring the well being of the child. It provides for the establishment of institutions, guidelines and processes for child protection such as custody, maintenance, foster care, guardianship and adoption.

Principles Underlying Child Rights Protection

The Children Act lists the principles which inform the protection of the rights of children as follows:

- i. Non-discrimination:** Children should not be discriminated against on their own basis or on the basis of their parents or legal guardians' race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or any other status.
- ii. Best interests of the child:** In all decisions and actions that affect a child, primary consideration should be given to the best interests of the child.
- iii. Survival and development:** Children have a right to survival and development in their physical, emotional, psychological, cognitive, social and cultural aspects of their lives.
- iv. Participation:** Children should be allowed to actively participate in all decisions that affect them.

6.3. CLASSIFICATION OF THE RIGHTS OF CHILDREN

The rights of children can be classified into

- i. Life and survival rights
- ii. Protection rights
- iii. Development rights
- iv. Participation rights

¹ Adopted by the UN General Assembly in 1989 and came into force on 2 September 1990

6.3.1. Life and Survival Rights

The rights that fall under this category include:

- i. **Right to life:** Without life, the other rights are meaningless. Children should be protected from situations that may take away their life. The ICCPR obligates States which retain the death penalty not to impose it on persons under the age of 18 years. This is the same position under the Kenyan law.
- ii. **Right to health:** Section 9 of the Children Act provides that “*every child shall have a right to health and medical care the provision of which shall be the responsibility of parents and the government.*” A similar provision on the right to health is found in article 24 of the CRC. The responsibility of ensuring that this right is fulfilled rests on both parents and the government. For example, failure to facilitate the immunisation of a child due to religious or cultural reasons is a violation of this right, and a criminal offence on the part of the parent or the guardian. Conversely, it is the responsibility of the government to provide sufficient medical institutions, manpower and supplies for immunisation.
- iii. **Right to nutrition:** Access to adequate and nutritious food is important for good health. The CRC provides for the application of readily available technology for the provision of adequate nutritious foods and clean drinking water. Both the State and parents have to participate in ensuring that children are well nourished. For example, nutrition support programmes by the government like the school feeding programmes in arid and semi arid areas is part fulfilment of this obligation.
- iv. **Right to shelter and clothing:** Although the Children Act provides no specific right to clothing, it is in the best interest of the child that parents and in certain instances the State, provide children with adequate and appropriate clothing.
- v. **Right to inheritance;** Affirming a child’s right to inheritance according to the Law of Succession Act (Cap. 160) Laws of Kenya. Section 17 (2)(b) of the Act further affirms that a child will not be disinherited based on various grounds such as age, sex, custom or religion. All children should therefore be treated equally in succession matters. The Act makes it an offence to deprive a child of any property accruing to them by virtue of the law relating to inheritance. The penalty imposed is two (2) years imprisonment or five(5) million shillings or both
- vi. **Right to peaceably assemble;** Extending the right of children to peaceably assemble, petition and demonstrate by virtue of section 28 of the Act. This means that children are now able to picket on pertinent matters, though this right is subject to the right of others.

6.3.2. Protection Rights

This category of rights protects children from harmful activities and vices in society.

- i. **Protection of a child without family:** The law requires that a child who do not have a family should be protected by providing alternative family care or institutional placement as a last resort. All efforts taken to meet this obligation must take into consideration the child’s cultural background and best interests. Where adoption is necessary, it should only be carried out in the best interests of the child and only in strict adherence to the law on adoption. Parents are also encouraged to arrange for guardianship of their children in case of their death or absence. Also Assimilating “Kafaalah” into the children’s legal framework. This means that a Muslim can take in a child who has been deprived of parental or family care and protection.(Section 12(2) of the Act). Introducing a new form of adoption, known as “Kinship Adoption.” Under this concept, relatives wishing to adopt children will be able to do so in a much cheaper and faster manner, devoid of legal technicalities.(Section 183). Providing for the establishment of children rescue centres in every county. These centres are required to provide temporary care of needy children, pending placement in alternative care.
- ii. **Protection from child labour:** Child labour is the engagement of children in the labour force to the detriment of their mental, physical, moral and social development. The Children Act guarantees children protection from economic exploitation and work that interferes with their education or is harmful to their health, physical, mental, spiritual, moral or social development. It is not child labour for children to undertake household chores to assist their parents and guardian as long as doing so is not exploitative and does not interfere with their education, health or social and other development. Examples of child labour are: cattle herding during school time, child prostitution, child domestic work (house helps), hawking, car washing, matatu touting, ferrying and selling illicit brews and child factory workers.
- iii. **Protection from torture and deprivation of liberty:** The law protects children from torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty. By raising the age of criminal culpability of children from 8 to 12 years. This means that a child under the age of 12 years, shall not be held criminally responsible for any act or omission. The presumption of a criminal mind-set has been raised to children of 14 years and above.(Section 221). Implementing the Constitutional principle which states that the detention of a child before trial shall be considered as the last resort. Further, section 223 of the Act provides alternatives to such detention, including placement of children with a family or in an educational setting,among others.Discouraging arraignment of children who have committed minor offences. Instead, they shall be diverted to community-based correction systems listed under section 239 of the Act.
- iv. **Protection from abuse and neglect:** Section 13 of the Children Act provides children with a right to be protected from physical and psychological abuse and other forms of child abuse. They are protected from mistreatment by parents and other persons responsible for their care. Further, the Act requires the relevant minister to establish appropriate treatment and rehabilitation facilities for children in conflict with the law.
- v. **Protection from drug abuse:** The Children Act, section 16, and the CRC provide that

children have a right to protection from production, trafficking or use of narcotic and psychotropic drugs and substances.

- vi. **Protection from sexual exploitation and abuse:** Section 15 of the Children Act provides children with the right to be protected from sexual exploitation and abuse, which includes prostitution and involvement in pornography. The Sexual Offences Act and the Penal code also reinforces this right by outlawing commission of offences against morality like rape, defilement of girls below 18 years, abduction of girls below 18 years, indecent assault and incest.
- vii. **Protection by the law:** Like adults, Articles 20 and 27 of the Constitution guarantees children equal protection by the law. Children in conflict with the law enjoy all the rights of an arrested person and to fair hearing. Children's cases should be heard in private so as to protect their identity. Those who cannot afford private lawyers are entitled to legal aid at public expense.
- viii. **Protection from discrimination:** Section 5 of the Children Act provides that children have a right not to be discriminated against on grounds of their or their parents' origin, sex, religion, custom, language, opinion, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. This provision is similar to Article 27 of the constitution on non-discrimination.
- ix. **Protection in disaster situations:** Children need special protection in hardship situations such as war, famine, poverty and other natural calamities. Where children are survivors of armed conflict, torture, neglect, maltreatment or exploitation, the government has a responsibility to ensure that they receive counseling and treatment for their recovery and social reintegration
- x. **Protection from armed conflict and enlistment as soldiers:** Children should not take part in armed conflict. Section 10 the Children Act obligates the government to protect children from recruitment into armed conflict as soldiers. The CRC sets the age limit for recruitment at 15, while the African Charter and the Children Act put it at 18 years. The Optional Protocol on the Involvement of Children in Armed Conflict imposes an obligation on States to put the minimum age for compulsory recruitment at 18, and voluntary recruitment at 16 years. Kenya has ratified this protocol.
- xi. **Special care for children with disabilities:** Section 12 of the Children Act states *"A disabled child shall have the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible."* It is the government's obligation to fulfil these guarantees through public education, provision of free or affordable medical and educational facilities. It is a violation to shun and lock up children with disabilities.
- xii. **Protection from harmful cultural rites:** The African Charter requires States to abolish customs and practices that are harmful to the development, welfare and normal growth of the child. Both the Children Act and Prohibition of Female Genital Mutilation Act protect children from being subjected to harmful cultural practices such as female genital mutilation and early marriages. These and similar rites, customs or traditional practices are likely to negatively affect the child's life, health, welfare, dignity and or physical and psychological development.

6.3.3. Development Rights

- i. **Right to education:** The right of children to education is well elaborated in the CRC as i.well section 7 of the Children Act. Education is a critical right as it affects the ability of children to enjoy other rights as children and in adulthood. Both the CRC and the Children Act emphasises compulsory and free primary education while secondary and higher education should be made available and accessible. The Basic Education Act criminalises failure to take children to school. The education offered should develop a child's personality, talents, mental and physical abilities to their fullest and prepare them for active adult life in a free society. The education should also encourage the child's respect for his or her family, cultural and artistic activities and enable them to enjoy their culture, profess their religion and practise their language. The government has a responsibility to ensure that the education that is afforded to students is not of inferior quality, it is available, affordable and accessible.
- ii. **Right to parental care:** Living in a happy family that offers parental love and care is important for the growth of children. For this reason, section 6 of the Children Act provides that children have a right to live with their parents, unless this is not in the best interests of the child. In case the parents are separated, the child is entitled to maintain contact with both parents. Parents have joint primary responsibility for raising the child. It is the parents' responsibility to care for their children and ensure that they do not neglect them.
- iii. **Right to name and nationality:** Both the CRC and the Children Act under section 11 guarantees every child the right to a name, nationality and protection from deprivation of their identity. At birth, parents have an obligation to facilitate the acquisition of a birth certificate and an identity card at the age of majority. Lack of a birth certificate may prevent a child from receiving health care, nutritional supplements and social assistance. A birth certificate also assists in protecting children against early marriages, child enlistment in the armed forces, and prosecution as an adult when in conflict with the law.

6.4. Parental Responsibility

Section 23(1): Provides that "responsibility for the protection, care, and maintenance of a child rests equally on the father and the mother of the child whether or not the child's father and mother are or have been married to each other."

In the case of **C.K. (a child) through Ripples International as her guardian and next friend) v Catholic Archdiocese of Nairobi & 3 others [2013]**, the court held that both parents have equal parental responsibility regardless of their marital status.

Section 23(3) Parental responsibility extends beyond 18 years for children with mental or physical disabilities who need continuing care and support. The court may order extension of parental responsibility beyond 18 years if it is in the best interests of the child. Parents and children can mutually agree to extend aspects of parental responsibility like maintenance beyond 18 years through a written agreement. The Children (Amendment)

Act 2022 amended the definition of a “child” in the Children Act to mean a human being below the age of 18 years.

6.4.1. Custody

Section 25: In making orders for custody, the court shall regard the welfare of the child as the paramount consideration. It shall take into account the wishes of the child, depending on age, level of maturity and gender.

Section 26(1): Provides for various options for custody including joint or sole custody to either parent, custody to a third party, or to an institution.

In *K.M.N v R.K.N [2020]*, the court awarded joint custody to separated parents as it was in the best interests of the child to access both parents.

6.4.2. Maintenance

Section 28(a): Both parents obliged to maintain a child whether married, separated or never married.

Section 30-37: Provide guidelines for assessment of maintenance amounts based on parents’ income, age of child, number of children, etc.

In *P.M.K v A.M.M [2018]*, the court ordered a father to pay maintenance for his child born out of wedlock after DNA confirmed paternity.

6.4.3. Access

Section 53(1)(c)(iii): A parent can be denied access if it poses risk of harm to the health and morals of the child.

In *K.A.M v K.M.N [2019]*, the court set access terms for a father denying him overnight access due to a history of alcoholism and violence.

6.5. Guardianship

Guardianship refers to the duty and authority to make decisions concerning a child’s upbringing, education and welfare. A guardian may be appointed to take over parental responsibility if the parents die, are unable to fulfil their responsibilities, or in divorce cases.

6.5.1. Appointing Guardianship

Under the Children Act, guardians can be appointed through:

- i. A will - A parent can nominate a guardian through a will to assume responsibility if the parent dies. [Section 107].
- ii. Court order - Any person can apply to the Children’s Court to be appointed as guardian of a child. The Court will determine if it is in the child’s best interests. [Section 105]
- iii. Guardianship Board - In certain cases, the Board can appoint a fit person to be the guardian of a child who lacks one. [Section 108]

6.5.2. 6.5.1 Consent of Parents

For guardianship applications through the Court or Board, consent of parents is required unless:

- i. They are unable or unfit to give consent [Section 111]
- ii. They cannot be found after diligent efforts [Section 112]
- iii. There are circumstances justifying the lack of consent e.g. parents abandoning the child [Section 113]
- iv. If parents object, the Court/Board will hold a hearing to determine if guardianship is necessary for the child’s welfare. [Section 114-116]

So parental consent is generally required, but there are exceptions if parents are unable or unfit to care for the child. The child’s best interests are paramount.

6.6. Overview of Adoption

Adoption is the process of legally transferring parental rights and responsibilities from a child’s biological parents to adoptive parents. It creates a permanent, legal parent-child relationship between the adoptive parents and adopted child.

6.6.1. Legal Implications of Adoption

The adopted child becomes part of the adoptive family and takes on their surname. All parental rights and responsibilities are transferred to adoptive parents. The biological parents lose all rights and duties over the child. Adoptive parents take over obligations to care for, maintain and educate the adopted child. The adopted child inherits property and assets from adoptive parents, not biological parents. Adoption cannot be reversed easily once legalised. Biological parents cannot reclaim the child. However, adopted children have a right to access information about their biological parents once they turn 18 years. The adoption process and parties involved must comply with requirements under the Children Act. This includes consent of parties, probation period, registration of adoption.

Who can adopt:

- Section 154: Either spouse or both spouses jointly can apply to adopt a child.
- Section 155: The adopter(s) must be at least 25 years and 21 years older than the child respectively, but court can waive this requirement if it is in the child’s best interests.
- Section 157: The court must be satisfied that the applicants are of good moral character and have sufficient ability to bring up and educate the child.

6.6.2. Consent for Adoption

Section 158 states that Consent is required from biological parents, guardians, spouses of the adoptive applicants, and the child if above 14 years. In Section 159 Consent can be dispensed with if the persons are unable/unfit to consent, cannot be found after diligent efforts, have abandoned the child, or consent is unreasonably withheld.

6.6.3. Adoption Process

In Section 160 An adoption application is filed in the Children's Court. The court will appoint an adoption society to investigate and submit a report. Sections 161-162 provide that The court will consider the application and report, and grant an interim order if satisfied adoption will be in the child's best interests. Under Section 163, If the interim order successfully expires after 3-6 months, the court will make a final adoption order severing all legal ties between the child and biological parents.

Effects of adoption order

- Section 164: Upon adoption, the child becomes the legitimate child of the adopters and their heirs. The child ceases to be part of the biological family, except for inheritance purposes.
- Section 165: The adopted child gains rights to custody, care, maintenance and inheritance in the adoptive family. The child bears the surname of the adoptive parents.
- Section 166: Exceptions can be made in the adoption order to allow the child to inherit from biological parents/relatives.

The adoption process under the Children Act aims to protect the welfare of the child while creating a full legal parent-child relationship between the adoptive parents and adopted child.

6.6.4. Institutions that Handle Children's Matters

1. Children's Officers:

- Section 30(1): Provides for the designation of Children's Officers by the Director of Children's Services. Section 30(1) was amended to require every Children's Officer to have a degree in social work, sociology, psychology or other child-related fields.
- Section 32: Sets out the duties of Children's Officers including investigating cases of child abuse, taking children into place of safety, supervising foster care placements, presenting child cases in court.
- Section 133: Empowers Children's Officers to enter into Parental Responsibility Agreements with parents.

2. Children's Court:

- Section 73: Establishes a Children's Court as a division of the High Court to handle legal proceedings concerning children.
- Section 74: Sets out the jurisdiction of the Children's Court over matters like custody, maintenance, adoption, child protection proceedings etc.
- Section 76: Provides for matters to be determined in the best interests of the child. Section 76 was amended to allow Children's Courts to adopt alternative dispute resolution mechanisms in adjudicating matters, to facilitate conciliation between parties.

3. National Council for Children's Services:

- Section 36: Establishes the National Council for Children's Services to coordinate governmental agencies dealing with child welfare and protection.
- Section 37: Sets out the functions of NCCS including formulating policies, setting standards for institutions that provide services to children etc.

4. National Adoption Committee:

- Section 155A: Establishes the National Adoption Committee.
- Section 158(5): Requires the NAC to approve all adoption orders, both local and inter-country. Section 158 was amended to increase the composition of the National Adoption Committee from 7 to 9 members.

Question: John and Jane have been married for 5 years and have a 3 year old daughter named Michelle. John has been physically abusive towards Jane over the past year and has also been neglecting his parental duties towards Michelle. Jane tried counselling and reconciliation but John's abusive behaviour continued. They are now considering separation. Jane is worried about Michelle's well-being and safety if John is allowed custody or unsupervised access. John insists he has an equal right to custody as the father. Jane has no income of her own.

Advise Jane on the following aspects based on the provisions of the Children Act 2022:

- What are Jane's options for seeking custody of Michelle? Discuss the factors the court will consider.
- Can the court restrict John's access to Michelle? If so, under what circumstances?
- What can Jane do to seek maintenance for Michelle if she is granted custody?
- Who would have parental responsibility over Michelle after separation? Discuss if Jane remarries later.
- Any other legal advice relevant to protect Michelle's interests in this situation.

Employment and labour relations laws address relationships between employers and their



CHAPTER SEVEN:

Employment And Labour Rights

employees. The aim of the laws is to regulate labour relations to ensure fairness in the employment process and protect workers from exploitation.

7.1. THE RIGHTS OF AN EMPLOYEE

- i. **Right to written particulars of employment** - Section 8 requires employers to furnish employees with a written contract stating particulars of employment. In *Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation*² The Court held that an employment contract was so essential that it was constructively renewed where a contract lapsed and the employer failed to issue a renewal.
- ii. **Right to fair remuneration** - Section 10 provides for the right to equal pay for work of equal value. Section 12 requires timely payment of wages in legal tender. In *Kenya National Union of Nurses v Permanent Secretary Ministry of Health & 2 others*³ The court categorically stated that *denying a grievance his salary for the work done before formal dismissal would amount to upholding servitude and inhuman treatment contrary to the constitutional tenets*.
- iii. **Right to humane working conditions** - Sections 15-28 cover rights related to working hours, annual leave, maternity leave, sick leave, housing etc. In the case of *Rajab Barasa & 4 Others versus Kenya Meat Commission*⁴. The court stated that the employer must ensure each employee has taken the annual leave when due or make payment in lieu thereof.

The court in *Esther Njeri Maina v Kenyatta University* echoed the provisions of s.29 of the Employment Act to the fact that every employee is entitled to three months maternity leave on full pay. The court declared that the respondent had violated this right by unduly influencing her to sign a contract which made no provision for maternity leave.

In *Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd* It was held that an employee is entitled to sick leave. However, for an employee to be entitled to sick leave with full pay, the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.

In *Joseph Otieno Onyango v M/S Kaajal Textiles Ltd & Another* The court stated as follows: “The Employment Act, 2007 envisages that leave is a right to every worker with Section 28 setting the minimum to 21 days for each year. The Respondent indicated that the claimant had utilised his leave for the period of that year but there is no proof of this assertion. At the time the claimant went to bury his father even if he was not taking his annual leave, he would have been entitled to some leave on a compassionate basis. I believe the dismissal of the claimant for turning up 2 days later after burying his father was callous and unwarranted.”

- iv. **Right against discrimination** - Section 5 prohibits discrimination in employment on grounds like race, colour, sex, religion, HIV status etc. In *G M V v Bank of*

*Africa Kenya Limited*⁵ The ELRC declared that the Claimant's termination of service by the Respondent was based on her pregnancy, and therefore discriminatory, unfair, unlawful, and in violation of the Employment Act 2007, the Contract of Employment, and the Constitution of Kenya.

- v. **Right to join trade unions** - Section 78 guarantees freedom of employees to join trade unions of their choice.
- vi. **Right to participate in collective bargaining** - Section 54 provides for representation of employees in collective bargaining.
- vii. **Right to participate in peaceful strikes** - Section 80 allows employees to participate in strikes organised in accordance with the law.
- viii. **Right to fair termination** - Sections 40-46 lay down procedures for valid termination of contracts and related employee rights. In *John Nduba v Africa Medical and Research Foundation (AMREF Health Africa)* The court stated that as per the terms stipulated in the contract of employment there was a legitimate expectation of issuance of notice as to whether the employment contract would be renewed at the time of its expiry. The court went ahead to indicate that in the absence of such a notice, salary in lieu of notice would be paid. In the absence of either the termination would be deemed to be wrongful and therefore unlawful.
- ix. **Right to enforcement** - Section 15 establishes mechanisms like the Labor Office and Employment and Labor Relations Court to enforce the provisions of the Act.

7.2. Termination of Employment

What amounts to unfair termination:

- Section 43: Termination is unfair if the employer fails to prove it was fair and lawful.
- Section 45: Unfair terminations include cases where the employee engaged in trade union activities, cases of discrimination e.g. pregnancy or HIV status, reasons unrelated to employee's conduct, performance or qualifications.
- Section 47: Employers should follow principles of natural justice - inform employees of cases against them, give them a chance to defend themselves before termination.

7.3. Remedies for Unfair Termination

- Section 49: Employees can file complaints at the Labor Office.
- Section 78(5): Labor Officer may order reinstatement or re-engagement of the employee.
- Section 87(1): Labor Court may make an award of compensation for unfair dismissal capping it at 12 months' remuneration.

In *Stanley Kinyanjui v. Tony Hotels [2019]*, the court held the employer unfairly terminated the employee without adhering to principles of natural justice. It awarded him

⁵ *G M V v Bank of Africa Kenya Limited* [2013] e KLR

² *Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation* [2012] eKLR

³ *Kenya National Union of Nurses v Permanent Secretary Ministry of Health & 2 others* [2020] e-KLR

⁴ *Rajab Barasa & 4 Others versus Kenya Meat Commission* [2016] e-KLR

compensation equivalent to 6 months' salary.

7.4. Dispute Institutions for Labor Matters

1. Labor Office

It is headed by the Labor Commissioner who is appointed under the Labor Institutions Act. It handles individual labour disputes through mediation, conciliation and arbitration under the Employment Act. Makes awards for unfair termination, unlawful deductions, discrimination etc.

2. Industrial Court

Established under the Industrial Court Act 2011, it has exclusive jurisdiction over collective labour disputes, trade union disputes, employer association disputes etc. Makes awards on disputes related to interpretation of collective agreements, trade union elections, strikes etc.

3. Employment and Labour Relations Court

Established under the Employment and Labour Relations Court Act 2011. It handles appeals of individual cases decided by the Labor Office. Also determines employment and labour relations cases like wrongful termination.

4. Committee of Inquiry

Appointed by Cabinet Secretary for Labour to inquire into trade disputes of national interest. It makes recommendations to resolve long-standing labour disputes.

question; John has been working as a construction supervisor with BuildTech Contractors Ltd for the last 5 years. While on duty, John suffered a fall that resulted in both his legs being fractured. He informed BuildTech about the accident and took sick leave to recover. The company paid his wages for the first two months of sick leave. However, John's recovery was slow and the doctor recommended he take complete rest for 4 more months. When John requested for extended sick leave, BuildTech instead terminated his employment by email on grounds of prolonged absence. John seeks your legal advice on the below issues:

- ☐ Advise John on his entitlement to any compensation for the accident under the Work Injury Benefits Act (WIBA).
- ☐ Was John's termination by BuildTech lawful under the Employment Act? Discuss grounds on which it can be considered unfair termination.
- ☐ What legal recourse does John have under both WIBA and Employment Act for his work injury and termination? Discuss the remedies available and procedure for seeking them.
- ☐ Any other recommendation to protect John's labour rights in this situation.

7.5. Child Labor & Child Domestic Work

Child labour and child domestic work are critical issues that affect the well-being and development of children across the globe. In Kenya, the government has taken significant steps to address these concerns by implementing a legal framework that seeks to protect the rights and welfare of children.

Child labour in Kenya is primarily governed by the Employment Act, No. 11 of 2007. Section 56 of this act explicitly prohibits the employment of children under the age of thirteen. This provision underscores the government's commitment to ensuring that children are not engaged in work that is hazardous to their health, education, or overall development. Additionally, Section 57 of the Employment Act establishes specific guidelines for the employment of children between the ages of thirteen and sixteen, ensuring that their work does not interfere with their schooling.

Child domestic work, a subset of child labour, is also addressed within the Kenyan legal framework. The Children's Act, is a crucial piece of legislation that contains provisions specifically related to child welfare. Under this act, Section 21 prohibits child labour and places a responsibility on parents, guardians, and employers to ensure that children are not engaged in hazardous or exploitative work.

With specific provisions that outline the age restrictions, nature of work, and conditions aimed at protecting children's rights, including their right to education and health. Here are some relevant sections from the Employment Act, No. 11 of 2007 and the Children's Act:

1. Age Restrictions

Employment Act (Section 56): This section prohibits the employment of children under the age of thirteen. It reads, "No child under the age of thirteen years shall be employed to work in any undertaking."

Employment Act (Section 57): This section outlines the conditions under which children between the ages of thirteen and sixteen can be employed. It ensures that their work does not interfere with their schooling and prohibits their employment during school hours.

2. Nature of Work

Employment Act (Section 56): While Section 56 primarily addresses the age limit, it indirectly implies that the nature of work should not be hazardous to the child's health, education, or development.

Children's Act (Section 21): This section under the Children's Act prohibits child labor and any work that may be exploitative or harmful to the child.

3. Work in 3rd Party Homes

Employment Act (Section 59): This section deals with domestic work and outlines that children may be employed in domestic work under certain conditions, ensuring their safety and well-being.

4. Work That Makes a Child Unable to Enjoy Basic Rights

Children's Act (Section 21): This section explicitly prohibits child labour and work

that may jeopardise a child's right to education, health, and other basic rights.

7.6. Exploitative Child Labor

The Constitution of Kenya prohibits exploitative child labour. Article 53(1)(d) states that every child has the right to be protected from economic exploitation and any work that is likely to be hazardous or interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

The Employment Act 2007 is the main law regulating employment relationships in Kenya. Section 56 prohibits the employment of children under 13 years old in any undertaking. Children between 13-16 years can only be employed to perform light work, under supervision of an adult, which does not affect their health, education or development. The work must also be approved by the Minister of Labor through a permit.

The Children Act 2001 is also relevant. Section 10 prohibits engaging a child in the worst forms of child labour which includes slavery, illicit activities, and work which is likely to interfere with their education, be harmful to their health or physical, mental, spiritual, moral or social development.

Section 11 specifically prohibits child trafficking while Section 12 prohibits child prostitution.

The Sexual Offences Act 2006 also criminalises child prostitution and child trafficking for sexual exploitation in Sections 15, 16, and 17.

The Penal Code criminalises procuring or allowing the prostitution or defilement of a child under 18 years in Sections 166 and 167.

The Narcotic Drugs and Psychotropic Substances Control Act also prohibits the use of children in the production and trafficking of drugs in Section 7.

The overall penalties for violating the child labour laws range from fines to imprisonment depending on the offence. There are also provisions allowing for the withdrawal of any relevant licences or permits if a business is found to engage in child exploitation.

7.7. Child Domestic Work (What is and is not Allowed)

Child domestic work is regulated under Kenyan employment laws and children's rights legislation. The Employment Act 2007 completely prohibits employing children under 13 years for domestic work. For children between 13-16 years, they can be engaged in domestic work if it is light duties that do not interfere with the child's health, education or development. Such work must be supervised by an adult and cannot exceed 6 hours per day, with adequate rest, food, shelter and wages provided as per the Employment Act. Critically, the employer must obtain a work permit for the child from the Ministry of Labor. Furthermore, hazardous work like operating machinery, working with chemicals or carrying heavy loads is completely prohibited. Night work between 6:30PM-6:30AM is also banned for 16-18 year olds under the Employment Act. The Children Act adds further protections by prohibiting any work that exposes a child to physical, mental or moral danger or interferes with their education and development. It also requires employers to protect children from all forms of abuse, neglect and exploitation.

7.7.1. Practical Steps to Address Child Domestic Work

1. Identification of CDW Cases

- ☐ At the community level, neighbours, Nyumba Kumi elders, teachers, or community health volunteers can identify suspected cases of child exploitation.
- ☐ Paralegals and civil society organisations also help in ongoing monitoring and identification through community outreach programs.
- ☐ Labour officers from the Ministry of Labor can identify cases during workplace inspections and routine checks.
- ☐ The area Assistant Children's Officer plays a key role in continuously mapping vulnerable children which aids in early identification of CDW.

2. Rescue/Removal of the Child

- ☐ Once a case is identified, the Assistant Children's Officer or police are informed to facilitate immediate removal of the child from the workplace.
- ☐ Rescue should be undertaken carefully to avoid further trauma to the child. The child should be reassured first and all efforts taken to avoid confrontation with the employers.
- ☐ Police are authorised to access premises and remove the child using reasonable force if required. They later document the rescue process through statements and reports.

3. Medical Care and Psycho-social Support

- ☐ Upon removal, the child is taken for medical examination and treatment for any injuries, malnutrition or illness resulting from the exploitation.
- ☐ The child is also taken to a place of safety like a rescue centre, children's institution or foster care for temporary custody.

- ☐ At the place of safety, the child receives psycho-social support including counselling, mentorship and life skills training to aid in recovery from trauma.

4. Investigations and Evidence Collection

- ☐ Police carry out in-depth investigations by recording witness statements from the child, parents/guardians, employers and other relevant witnesses.
- ☐ They collect documentary evidence including medical reports, the child's birth certificate, employer work permit or records.
- ☐ The evidence gathered is used in prosecution of offenders.

5. Legal Assistance and Access to Justice

- ☐ Through the Department of Children's Services and paralegal organisations, the child and parents are provided legal assistance including counselling, legal advice and representation in court.
- ☐ The Office of the Director of Public Prosecutions has specialised prosecutors who take up child exploitation cases in court on behalf of the victims.

6. Rehabilitation and Community Reintegration

- ☐ The Children's Officer facilitates counselling for the child and parents, and assessing the readiness of the family to receive the child back.
- ☐ The child may be taken back home, placed in a foster family or enrolled in a vocational training program to learn income generating skills.
- ☐ Ongoing follow up is done through home visits to ensure the child fully reintegrates back into family and community.

7. Awareness Creation and Prevention

- ☐ Chiefs and community leaders hold regular barazas to educate residents against child exploitation.
- ☐ School programs raise awareness among children on their rights and reporting abuse.
- ☐ Civic groups carry out grassroots campaigns on positive parenting and child protection norms.

CHAPTER EIGHT:

Rights Of Marginalised & Minority Communities

Article 260 of the Constitution defines marginalised community as:

“Marginalised community” means—

- (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
- (d) pastoral persons and communities, whether they are— (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

Article 56 on Minorities and marginalised groups stipulates that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups:

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;
- (c) are provided special opportunities for access to employment;
- (d) develop their cultural values, languages and practices; and
- (e) have reasonable access to water, health services and infrastructure.

8.1. SEXUAL MINORITIES

There is no universally accepted English language word, phrase or acronym for people whose sexuality and sexual orientations depart from majority norms. In this paper, the term ‘sexual minorities’ will be used.

8.1.1. GAY

The Lesbian, Gay, Bisexual & Transgender Community Center (hereinafter the ‘Community Center’) defines this term to mean a man whose enduring physical, romantic, and/or emotional attractions are to people of the same sex.

8.1.2. LESBIAN

The Community Center uses the term to refer to a woman whose enduring physical, romantic, and/or emotional attraction is to other women.

8.1.3. BI-SEXUAL

The Community Center uses the term to describe a person who has the capacity to form enduring physical, romantic, and/or emotional attractions to those of the same gender or to those of another gender. People may experience this attraction in differing ways and degrees over their lifetime. Bisexual people need not have had specific sexual experiences to be bisexual; in fact, they need not have had any sexual experience at all to identify as bisexual.

8.2. GENDER MINORITIES

There is no universally accepted English language word, phrase or acronym for people whose biological sex, gender identity and/or gender expression depart from majority norms. In this paper, the term ‘gender minorities’ will be used.

8.2.1. TRANSGENDER MALE TRANSGENDER FEMALE

The Community Center defines this as an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms including transgender. Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.

8.2.2. INTERSEX

Intersex is a general term used for a variety of situations in which a person is born with reproductive or sexual anatomy that doesn’t fit the boxes of “female” or “male.” Sometimes doctors do surgeries on intersex babies and children to make their bodies fit binary ideas of “male” or “female”. Doctors always assign intersex babies a legal sex (male or female, in most states), but, just like with non-intersex people, that doesn’t mean that’s the gender identity they’ll grow up to have. This brings up questions about whether or not it’s okay to do medical procedures on children’s bodies when it’s not needed for their health.

Being intersex is a naturally occurring variation in humans, and it isn’t a medical problem therefore, medical interventions (like surgeries or hormone therapy) on children usually aren’t medically necessary. Being intersex is also more common than most people realise.

There are many different ways someone can be intersex. Some intersex people have genitals or internal sex organs that fall outside the male/female categories — such as a person with both ovarian and testicular tissues. Other intersex people have combinations of chromosomes that are different than XY (usually associated with male) and XX (usually

associated with female), like XXY. And some people are born with external genitals that fall into the typical male/female categories, but their internal organs or hormones don't.

If a person's genitals look different from what doctors and nurses expect when they're born, someone might be identified as intersex from birth. Other times, someone might not know they're intersex until later in life, like when they go through puberty. Sometimes a person can live their whole life without ever discovering that they're intersex.

8.3. RIGHTS OF PERSONS WITH DISABILITIES

8.3.1 Legal Framework

- The Persons with Disabilities Act, 2003 is the key statute protecting the rights of PWDs in Kenya. However, it has not been fully implemented.
- The National Council for Persons with Disabilities Act, 2003 established the NCPWD to oversee welfare of PWDs.
- Article 54 of the Constitution 2010 obligates the State to ensure the rights of PWDs are respected, protected and fulfilled.
- Kenya is also a signatory to the UN Convention on the Rights of PWDs.

8.3.2 Rights and Protections

- Right to access educational institutions, health services, public transport and buildings. Any denial is considered discrimination (Section 18).
- Right to access materials and devices to overcome constraints arising from the disability (Section 7).
- Exemption from all forms of discrimination in political, economic, social and cultural spheres of life (Section 12).
- Right to suitable and affordable housing, and to live independently in the community (Sections 19, 20).
- Right to use sign language, Braille or other appropriate means of communication (Section 21).
- Equal rights to vote and vie for elections. Independent Electoral Commission must provide accessible voting facilities (Section 29).
- Right to access materials and devices to overcome limitations arising from disabilities (Section 7).

8.3.1. Tax Exemptions

- Under the VAT Act 2013, supplies made to institutions caring for PWDs are VAT exempt.

- The Income Tax Act exempts income of organizations catering for PWDs, and also allows deductions for expenditures incurred to access treatment and special education services for PWDs.

Relevant Cases

- In *Leonard Cheshire Disability Kenya Society v County Government of Nairobi* Petition No. 133 of 2016, the court held denial of planning permission to an institution for children with disabilities amounted to discrimination and violation of constitutional rights to accessible housing for PWDs.

8.4. ADVOCACY AREAS

- The Disability Bill 2018 seeks to align law with the Constitution and UN Convention. It needs to be passed into law.
- Sensitization of public institutions like courts, police and hospitals to provide sign language interpreters and make facilities accessible.
- Increase employment opportunities in public and private sector for PWDs through affirmative action policies.

Duncan Otieno Waga v Attorney General

The claimant was enlisted as a police constable. While serving at the central bank of Kenya, he developed an eye problem but continued to do special duties. In 2004, he was transferred from the central bank post despite his protests. Between 2004 and 2008, he was not assigned any duties although he was fully able to do certain special duties. He was referred to appear before a medical board which recommended that he be rehabilitated to perform special duties such as radio operator, telephonist and receptionist. He was later removed on medical grounds under section 30(2) of the Force Standing Order. In 2009, he was awarded a pension and was prematurely retired at the age of 46 years. Section 15(1) of the Persons with Disabilities Act prohibits employers from discriminating a disabled person. Section 15(6) provides that the minimum retirement age is 60 years. Article 1 of the Convention on the Rights of Persons Living with Disabilities defines reasonable accommodation as necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden where needed in a particular use to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of human rights.

The court held that there were special duties to which the claimant could be assigned. The court further held that the retirement was discriminatory and awarded him damages.



CHAPTER NINE:

The Rights Of Persons Living With Hiv

9.1. LEGAL FRAMEWORK

- HIV and AIDS Prevention and Control Act, 2006 - This is the primary statute governing the rights of people living with HIV in Kenya. It established the HIV Tribunal and various legal protections.
- Constitution of Kenya, 2010 - Article 43 provides for the right to health, while Article 27 upholds equality and freedom from discrimination for all persons.

9.2. NON-DISCRIMINATION

- Section 31 of the HIV and AIDS Prevention and Control Act prohibits discrimination against persons based on their actual, perceived or suspected HIV status.
- Discrimination is prohibited in fields of employment, education, health services, travel, habitation, insurance services etc.
- Violators are liable to a fine up to KES 500,000 or imprisonment up to 5 years or both.

9.3. CONFIDENTIALITY AND DISCLOSURE

- Section 18 guarantees the right to privacy of their health status. Unauthorized disclosure of HIV test results is an offense.
- Section 19 prohibits compelled HIV testing as a precondition for access to services like employment or education.

9.4. ACCESS TO TREATMENT AND HEALTH SERVICES

- Section 20 provides for access to healthcare services in public and private facilities without discrimination.
- Section 21 allows minors to consent to HIV testing and treatment without parental consent if a provider determines they have capacity.

9.5. EMPLOYMENT RIGHTS

- Dismissal on basis of HIV status is prohibited under Section 31.
- Mandatory HIV testing of employees/job applicants is unlawful per Section 16.
- Reasonable accommodation must be provided to perform duties.

In **E.A.L v St. Paul's University [2016]**, the claimant was denied a teaching job because he was HIV positive. The Tribunal held this amounted to unfair discrimination under the Act.

In the case of **VMK v CUEA**; the claimant was employed by the respondent as a telephone operator. There was a promotion to become a receptionist which she applied for but was

required to take a medical test. She was found to be HIV positive but the doctor failed to give her counselling. The doctor informed the employer without her consent and she did not get promoted. The court held that the respondents did discriminate against her based on her HIV status and also a breach of confidentiality done by the doctor. She was awarded Ksh.5,000,000 in damages.

9.6. ACCESS TO JUSTICE

- The HIV Tribunal established under the Act has powers to hear and arbitrate cases of HIV-related discrimination and rights abuses.

Question; John has been working as an accountant at Rose Enterprises for the last 3 years.

Recently, during a routine medical check organized by his employer, John tested positive for HIV.

The company doctor informed the HR manager of the test results without John's consent.

A week later, John was called to a meeting with the HR manager who told him that the company is letting him go as they feel he can no longer meet the demands of the job. As part of his termination process, John was asked to hand over all pending tasks to another colleague who will take over his role.

John was distraught at the sudden loss of employment and believes it is linked to his HIV positive status which must have been disclosed by the company doctor illegally. He has rent to pay and is worried how he will get health insurance and afford treatment without a job.

Required: Discuss the legal issues arising from this scenario under Kenyan law. Specifically, analyze:

- Whether John's privacy rights were violated*
- Any provisions on non-discrimination in employment under the HIV and AIDS Prevention and Control Act that may be relevant*
- The powers and role of the HIV Tribunal in this case*
- The potential outcome if John files a case before the HIV Tribunal against Rose Enterprises.*



CHAPTER TEN:

Sex, Gender, Gender Identity, Sexual Orientation

10.1. DEFINING AND DIFFERENTIATING SEX AND GENDER

Sex refers to the biological characteristics that categorise humans as either male or female. Sex is determined by genetic makeup, internal and external sex organs, hormones, and secondary sex characteristics. Gender refers to the social constructs and roles associated with being a man or woman within a society. Gender roles, norms and relations between men and women are learned through socialisation. Sex is static while gender tends to evolve over time. Discrimination occurs when rigid gender roles limit individual preferences, talents and freedoms.

10.2. DEFINING AND DIFFERENTIATING GENDER IDENTITY AND SEXUAL ORIENTATION

Gender identity refers to a person's inner sense of self as being male, female, both or neither. It may or may not correspond with their biological sex assigned at birth. Sexual orientation refers to a person's emotional, physical and sexual attraction towards another person. Common sexual orientations include heterosexual, homosexual and bisexual. Gender identity and sexual orientation are distinct concepts. Gender identity denotes who you are while sexual orientation denotes who you are attracted to.

10.3. UNDERSTANDING SEXUAL, SEX AND GENDER MINORITIES (LGBTI) IN KENYA

Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people are sexual and gender minorities who face discrimination due to their non-conforming sexual orientation or gender identity. Same-sex relations are currently criminalised under Sections 162 and 165 of the Kenyan Penal Code. This contributes to stigma, prejudice and violence against LGBTI persons. However, there is growing advocacy to decriminalise same-sex relations and legally recognize LGBTI rights. Article 27(4) of the Constitution prohibits discrimination on grounds of sex, gender and health status which offers protection to LGBTI persons. A 2019 High Court ruling also held that denying registration to a LGBTI organisation was unconstitutional. While positive developments exist, comprehensive anti-discrimination legislation is still required to fully protect LGBTI rights in Kenya.

10.4. GENDER MINORITIES AND THE RIGHT TO LEGAL RECOGNITION

There is no universally accepted English language word, phrase or acronym for people whose biological sex, gender identity and/or gender expression depart from majority norms. In this paper, the term 'gender minorities' will be used.

10.4.1. TRANSGENDER MALE/TRANSGENDER FEMALE

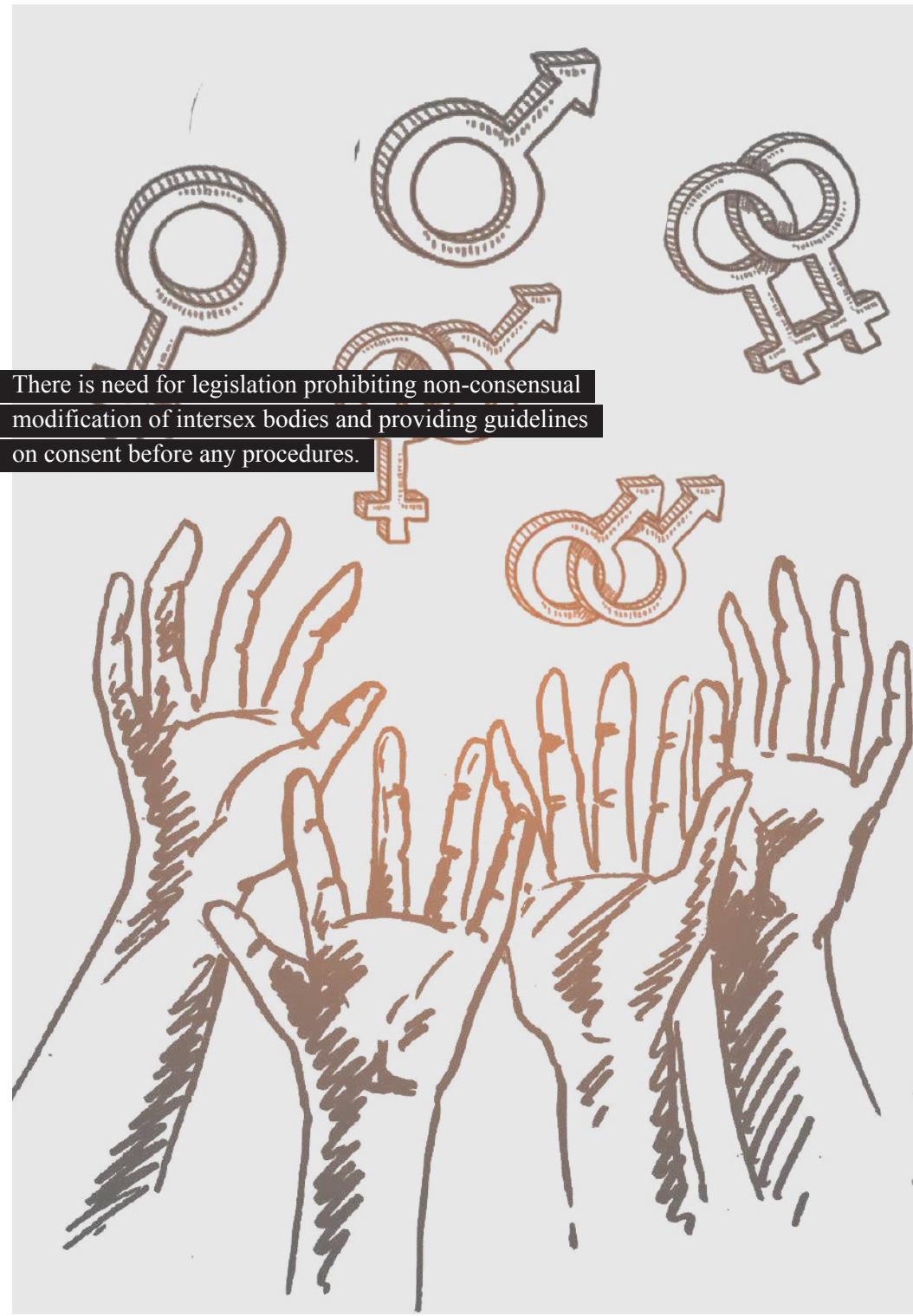
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10.4.2. INTERSEX

Intersex is a general term used for a variety of situations in which a person is born with reproductive or sexual anatomy that doesn't fit the boxes of "female" or "male." Sometimes doctors do surgeries on intersex babies and children to make their bodies fit binary ideas of "male" or "female". Doctors always assign intersex babies a legal sex (male or female, in most states), but, just like with non-intersex people, that doesn't mean that's the gender identity they'll grow up to have. This brings up questions about whether or not it's okay to do medical procedures on children's bodies when it's not needed for their health.

Being intersex is a naturally occurring variation in humans, and it isn't a medical problem therefore, medical interventions (like surgeries or hormone therapy) on children usually aren't medically necessary. Being intersex is also more common than most people realise.

There are many different ways someone can be intersex. Some intersex people have genitals or internal sex organs that fall outside the male/female categories — such as a person with both ovarian and testicular tissues. Other intersex people have combinations of chromosomes that are different than XY (usually associated with male) and XX (usually associated with female), like XXY. And some people are born with external genitals that fall into the typical male/female categories, but their internal organs or hormones don't. If a person's genitals look different from what doctors and nurses expect when they're born, someone might be identified as intersex from birth. Other times, someone might not know they're intersex until later in life, like when they go through puberty. Sometimes a person can live their whole life without ever discovering that they're intersex.



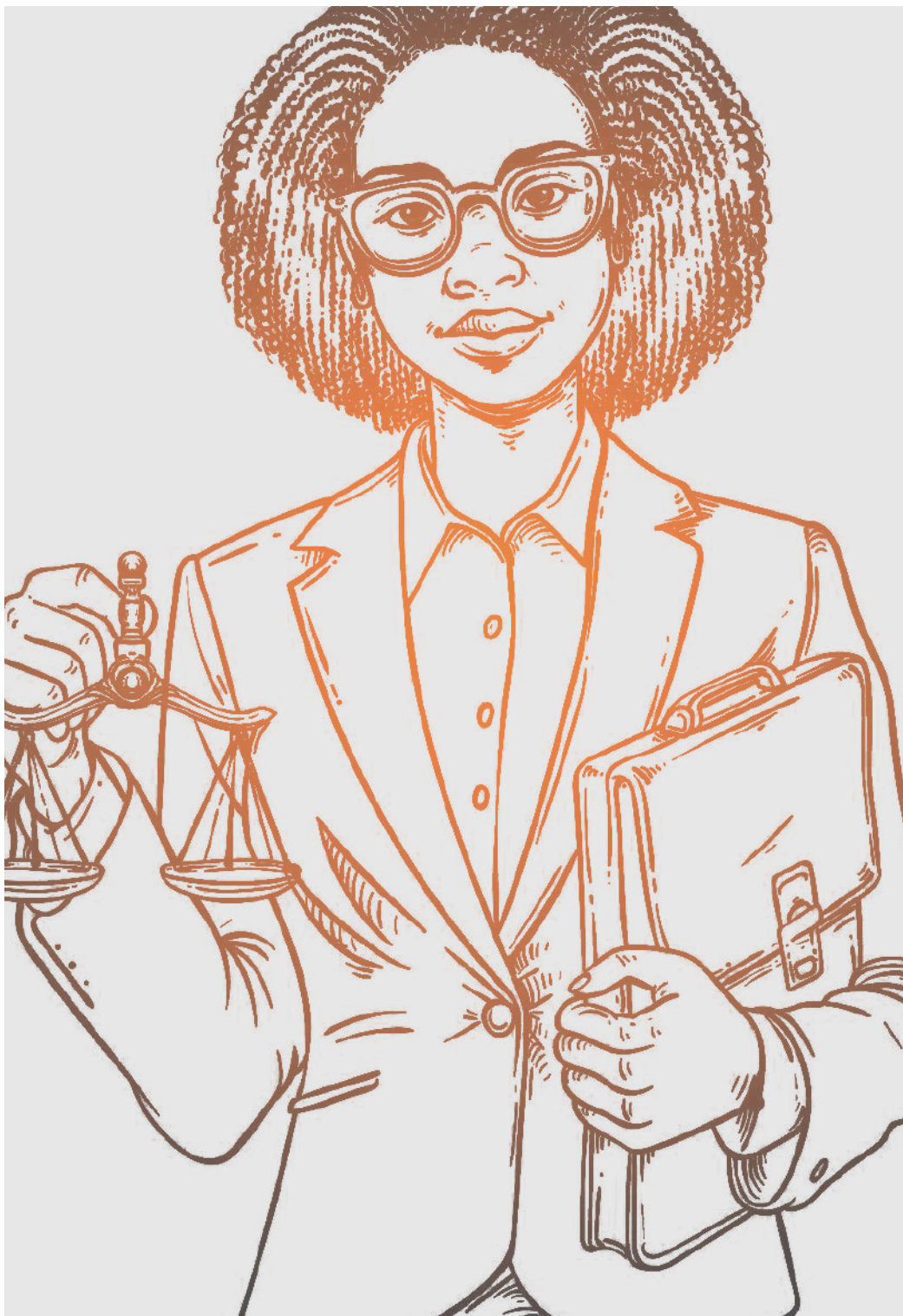
There is need for legislation prohibiting non-consensual modification of intersex bodies and providing guidelines on consent before any procedures.

Intersex people are born with sexual or reproductive anatomy that does not fit binary definitions of male or female bodies. In Kenya, intersex children often face violations from an early age. Reports indicate that some medical practitioners conduct medically unnecessary and irreversible surgeries on intersex infants to make their bodies conform to male or female norms. This is done without consent and causes long-term physical and psychological harm.

The lack of legal recognition and protection of intersex persons facilitates such violations. There is need for legislation prohibiting non-consensual modification of intersex bodies and providing guidelines on consent before any procedures. This will help curb harmful practices. The law should also allow intersex persons to obtain official documents with gender markers other than male or female.

Transgender persons whose gender identity differs from the sex they were assigned at birth also experience major discrimination. A case study is Audrey Mbugua who was denied the opportunity to formally change her name and gender markers in education certificates and national ID in 2014 despite undergoing gender affirming transition. The High Court dismissed her case calling her transgender status a mere “biological and physiological anomaly”.

Such rulings undermine transgender rights. Advocacy efforts continue for legal gender recognition, allowing transgender individuals to change identity documents to align with their gender identity. Access to affirmative healthcare is another major issue. The Kenya National Human Rights Commission recognizes that criminalization of same-sex relations hampers access to essential health services for LGBT persons. Legislative reform coupled with public education is required to address the challenges facing intersex and transgender persons in realizing their rights.



CHAPTER ELEVEN:

Paralegal Professional Ethics

Client interviews should begin with putting clients at ease and building trust between the client and the lawyer. This can be done through a warm handshake and a bit of chit-chat. This is important to enable the client to feel free to disclose everything that is relevant for the case. From the beginning, explain to the client the structure of the interview and that you will be making notes so they know what to expect. Allow the client to tell their story without unnecessary interruptions. Patiently listen attentively and actively, occasionally nod your head to indicate you are following the narration, maintain respectful eye contact, keep calm and collected even if the client's story is making you nervous. Thereafter, ask questions to clarify material facts avoiding legal jargon. Ask the client for the necessary documents, if they have not carried the documents, agree on the mode of delivering them to you. However, if you have contact with the client before the interview, advise them to bring the documents to the interview or have them email them to you beforehand. Sum up the interview by giving the client a summary of his case as told to you, focus on material facts. If you are able, give the client a preliminary legal opinion explaining the steps you will take going forward. If in doubt or uncertain, explain to the client that you will consider the case and give an opinion at a later specified time. Walk your client out of your office and thank them. After the interview, make a file note of the case, diarize follow-ups, discuss any concerns with colleagues or supervisor, and prepare the necessary documents. Once your opinion or documents are ready and approved by your supervisor, inform the client. Continue supporting the client until the case is finalised.

Note: Remember not to get emotional during the client interview. If the client is rude, abusive or condescending, remain calm and professional. However, if it becomes impossible to continue with the interview, explain to the client your intention to stop the interview, report to the supervisor.

11.1. PRIVILEGE AND CONFIDENTIALITY

Privilege and confidentiality refers to the privacy of the transaction between an advocate/ law student and their client. It should never be disclosed to third parties. This privilege exists in all cases and in respect to oral and documentary information received from a client. Any knowledge or fact derived from a client's communication is also privileged. Privilege exists even if a client has not paid fees. Privilege lasts forever and survives the death of a client, so long as there is an issue in which interests are in question. Section 137 of the Advocates Act extends privilege to other parties in communication with the advocate. Exceptions to advocate/client privilege are:-

- i. If there is any fraud or illegality. For instance, the client is accused of child abduction and he has disclosed to you where the child is being kept.
- ii. The names of your client, his address or the fact he has sworn an affidavit.
- iii. If there is an independent source of information.

11.2. PROFESSIONAL ATTRIBUTES

- i. **Patience:** It is imperative for an advocate/ legal clinic student to exercise patience with colleagues and clients. Patience helps one to extract all the factual details of a case from a client.
- ii. **Humility:** Advocates/legal clinic students must be humble and courteous when dealing with clients, colleagues and the public.
- iii. **Reliability:** Social justice clients, particularly the pro-bono ones are always worried of the consistency and reliability of free legal services. An advocate/ legal clinic student should assure the client and remain reliable till the conclusion of the matter.
- iv. **Punctuality:** Advocates/legal clinic students should always keep time for attending to clients, court and other clinic engagements, and undertake allocated assignments on time.
- v. **Manage emotions:** Advocates/legal clinic students must always avoid getting emotional and angry at the client, should avoid getting carried away by the client's story so much that they lose focus, laugh at the client, expressing bias or judgement towards the client or any other person involved in the case.
- vi. **Objectivity:** Strive to remain objective, avoid being quick to pass judgement or condemn the client even when the client is on the wrong. Be very careful not to engage in an argumentative discussion with a client.
- vii. **Flexible:** Advocates/ legal clinic students should not be dogmatic. One must be flexible to accommodate the client's views and considerations without compromising the best interest of the client. Further, exercise flexibility to negotiate the best deal for the client with the opposing side.
- viii. **Relationship:** Cultivate a friendly and respectful relationship with the client without getting emotionally entangled with the client or the client's case.
- ix. **Appearance:** It matters a lot how an advocate/ legal clinic student dresses while attending to clients. One should be well groomed and dressed in decent wear.

11.3. CONDUCT UNBECOMING

Conduct unbecoming of an advocate/legal clinic student may be defined to include the breach of good manners in legal practice. Examples include:

- a) Chewing gum while attending to a client
- b) Attending clients, office or court while drunk.
- c) Soliciting favours from clients i.e. sexual, monetary, gifts in kind, quid pro quo.
- d) Using bad language towards a client.
- e) Failure to honour commitments made to clients.
- f) Disclosing client issues to outsiders.
- g) Discussing the personal lives of your client(s).
- h) Incompetent representation of clients matters due to laziness and failure to research or seek guidance.

Notes

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