

The Codification of Artificial Reproduction.

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By

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DECLARATION

I, MWANGOLA WENDY ANABEL MAWONDO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.


Signed:
Date: 30/07/2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

[Dr Francis Kariuki]

ABSTRACT

Procreation in Africa is held with high esteem. Infertility therefore results to a great deal of humiliation, ridicule and in a worst-case scenario, physical and or emotional abuse. Surrogacy resultantly, is not a new phenomenon within the African customs. Traditional surrogacy was previously practice by women and men who wanted to salvage their name and that of their home. However, with the advancement in technology came about gestational surrogacy. Kenya is no exception. This study seeks to investigate the practice of surrogacy as it stands in Kenya. It as well intends to carry out a study on the South African practice of surrogacy; being a country where surrogacy seems to have a working regulatory framework; and attempt to compare and give a recommendation of a regulatory framework to govern this practice in Kenya. However, be that as it may, the end goal of the study is to investigate whether surrogacy should actually be a regulated process, seeing as the law cannot answer all questions.

The study reveals that in as much as surrogacy is not an uncommon practice, the legal framework currently in place does not suffice, due to the fact that the nature of the contract of surrogacy cannot fit in the realm of contract law. Perfect is not a term that can be used in the aforementioned scenario even if, in the assumption that it is possible, all lessons are implemented. Be that as it may, that Kenya could undoubtedly borrow from the South African regime which formulated a law speaking to the specifics of surrogacy such as the requirements of a surrogacy agreements, as well as the rights and responsibilities of the applicant parents, the surrogate mother, the child as well as the medics involved. This may assist in streamlining the process, even though, codification cannot in its entirety suffice.

LIST OF CASES

AMN & 2 others v the Attorney General & 5 others (2015) eKLR

Donoghue v Stevenson [1932] AC 562

Ex Parte WH & others (2011) High Court of South Africa

JLN, WKN and CWW v Director of Children's Services & 4 others (2014) eKLR

LIST OF LEGAL INSTRUMENTS

The *Constitution of Kenya* (2010)

The *Births and Deaths Registrations Act*, CAP 149

The *Children Act* (Act No. 12 of 2012)

The *Children Adoption Regulations* (2005)

The *Children's Act of South Africa* (Act No. 38 of 2005)

The *Contract Act*, CAP 23

The *Health Act* (Act No. 21 of 2017)

The *National Health Act of South Africa* (2003)

The *Penal Code*, CAP 63

The *Reproductive Healthcare Bill*, (2019)

The Assisted Reproductive Technology Bill of 2016

LIST OF ABBREVIATIONS

IVF In Vitro Fertilization

CHAPTER I: INTRODUCTION TO THE STUDY

This study seeks to address artificial reproduction, speaking specifically to surrogacy and In Vitro Fertilization in Kenya. Many countries shun this practice, some have embraced it, while others, like Kenya, have a somewhat friendly approach towards it. This chapter in particular provides an overview of the entire study. It begins with the background of the same, whose aim is to give insight on the topic. The statement of the problem thereafter provides a clear expression of the area of concern. There shall be a theoretical framework, which provides the perspective used in the study. The research methodology as well as the hypothesis and objectives shall be provided thereafter, and the chapter is concluded by a breakdown of the chapters of the study.

1.1 Background

'While we try to teach our children all about life, our children teach us what life is all about.'

~Angela Schwindt

The above being a quote most parents can relate to. The joy of giving birth can be compared to none; life ceases to revolve around you and starts to revolve around the 'tiny-human' you are now responsible for, the child completes your existence as well complements it in that you adapt to being stronger to ensure that they are protected and cared for.¹ As a human being you become more aware of what is around you, this is not only a lesson about life, but as well gives you joy in the little things you would have ordinarily not noticed; children tend to brighten up the lives of those around them which makes them a delight.² Though children may be considered as the bundle of joy, not all are capable of having children. For instance, in the Demographic and Health surveys from 1990 which were completed in 2004 with the collaboration of the World Health Organization, it was established that in every four couples from the developing countries, one is found to be infertile.³ Over the decade, there has been an exponential rise in surrogacy arrangements.⁴ But first to note what exactly is surrogacy and where does In-Vitro Fertilization come to play?

¹ <<https://parenting.firstcry.com/articles/5-funny-but-super-cool-perks-of-having-a-baby/>> on 10 October 2020.

² <<https://www.newtimes.co.rw/section/read/103029>> on 10 October 2020.

³ Stevens G, Vanderpoel S, Boerma T, Flaxman S & Mascarenhas M, 'National, Regional, and Global Trends in Infertility Prevalence Since 1990: A Systematic Analysis of 277 Health Surveys', 18 December 2012.

⁴ Bromfield N & Rotabi K, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations', Global Social Welfare, 1, 2014.

Surrogacy refers to a method of assisted reproduction where the applicant parents, who cannot carry a child on their own, work with the surrogate who will carry and care for their baby until birth.⁵ Generally, it helps those who are unable to have children become parents. Through In-Vitro Fertilization, embryos are created in a lab at a fertility clinic.⁶ Sometimes the intended parents use their own material (that is their own ova and sperm), whilst sometimes they use donated sexual gametes. At the fertility clinic, the embryo is then implanted into the gestational carrier who carries the baby to term. In this instance, the surrogate has no genetic relationship with the child.⁷

This process is not commonly practiced around the globe, most countries either shun the practice while others declare it illegal, for some both. Some countries have embraced surrogacy as well as have put in place legal provisions that govern the process, for example the United States and South Africa. Other countries have a somewhat lukewarm approach to this process, to mean, they may not exactly have laws on it, but the practice is tolerable like Kenya and Nigeria.⁸ The process is common amongst same sex couples who want to have a genetic link to the child, heterosexual couples that are unable to carry a child due to infertility and couples that have a genetic disorder or condition they do not want to pass on to the child.⁹

This research will direct its focus on the Surrogacy and IVF in Kenya. Couples not being able to bear children is not a new phenomenon. We have all heard of people termed as barren. This however was not the end of it, people somehow managed to maneuver around this 'fate'. For instance, previously, as per traditions of various communities, whenever a woman would be unable to carry a child, then the man would marry a second wife who would bear him his heirs.¹⁰ With the advancement in technology, the surrogacy process in the country is developing, and so are the clinics in the country that help to facilitate the same and IVF, for example the Nairobi IVF centre, the Lifebridge clinic and the Footsteps to fertility clinic based in Nairobi. We can assume that the country is still trying to find its footing with the process, this could explain the fact that it still has no legislation on the same.

⁵ <<https://www.circlesurrogacy.com/about/what-is-surrogacy>> on 9 September 2020.

⁶ <<https://www.circlesurrogacy.com/about/what-is-surrogacy>> on 9 September 2020.

⁷ <<https://www.circlesurrogacy.com/about/what-is-surrogacy>> on 17 January 2020.

⁸ 'Intended Parents', <<https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/what-are-the-international-surrogacy-laws-by-country/>> on 9 September 2020.

⁹ <<https://www.circlesurrogacy.com/about/what-is-surrogacy>> on 17 January 2020.

¹⁰ Masuku N, 'The position of a barren woman in African Society with reference to the folktale Unyumbakatali', University of South Africa, 2008.

Various complications could arise from the aforementioned process, for instance, as a surrogate you object yourself to certain risks such as the Intrauterine Growth Restrictions or in the instances of pre-term labour and low-birth weight of the baby,¹¹ what damages are applicable and to whom? Medical and legal expertise are clearly required throughout the process. It is rather unfortunate that this country has no legislation on the same, apart from a proposed bill.¹² Kenya being one of the herein mentioned countries that have demonstrated a lukewarm approach, this research will focus on the practice of surrogacy in Kenya as it stands, and suggest on possible laws to help curb the difficulties in the question, through a comparative study of South Africa's practice of surrogacy. Be that as it may, the nature of this contract cannot possibly fit in the realm of contract law. In addition, allowing surrogacy seems to open a pandoras box; who does the child belong to? What identity shall the child take? Is this a scenario of objectifying people with renting wombs and selling babies? The law cannot answer all questions. This study concludes with an opinion with regards to the aforementioned questions and whether artificial reproduction should even be legal to begin with.

1.2 Statement of the problem

A perfect world does not exist. Not even the law creates a perfect world. However, in pursuit of this, surrogacy and the In-Vitro Fertilization should be a statutory based process, in which one enters freely; freely in this case to mean without undue influence or duress whatsoever. In addition, as obtained from the neighbor principle in *Donoghue v Stevenson*¹³, you must take reasonable care to avoid acts or omissions which you can reasonably foresee that may injure or hurt your neighbor; in relation to the topic in question, all processes done should be safe for all who are involved. After all, we have a duty to love and care for our neighbor; who is defined as the person closely and directly affected by one's act that one ought to reasonably have them in contemplation as being affected when directing their mind to the acts called in question.¹⁴

It is rather unfortunate that this is not the situation at hand. With reference to the IVF procedure, it increases risk of infections, moreover, it can lead to future birth complications

¹¹ 'Potential Surrogacy Complications' <<https://info.worldwidesurrogacy.org/blog/potential-surrogacy-complications-and-how-to-avoid-them#:~:text=There%20is%20a%20high%20likelihood,gestational%20diabetes%2C%20or%20placental%20abruption>> on 6 December 2020.

¹² The Reproductive Healthcare Bill of 2019.

¹³ *Donoghue v Stevenson* [1932] AC 562.

¹⁴ *Donoghue v Stevenson* [1932] AC 562.

if not properly done and there is no assurance that the baby would reach its full-term. The surrogate as well as the applicant parents are not assured of their relationship to the unborn child. This is a contract gotten into, but the carrier can develop an attachment to the foetus and not want to let go. Currently, owing to the fact that Kenya has no regulatory laws on the same, the Surrogacy agencies get to make decisions that could heavily influence the people involved. For instance, Kenya is a homophobic state, therefore, should a homosexual couple decide to use the method in question to procreate, the agencies advice that only one partner should go to the clinic; rights over the child are carried by the intending parents and the child takes up the citizenship of the applicant parents as well.¹⁵ Through this research's comparative study, we seek to find out whether having a regulatory framework would assist in this process, and suggest on possible legislation to help better the process, as well as the rights that should be availed to all parties involved in order to ensure their interests are considered.

1.3 Justification of the study

The study seeks to look into the need for legislation in this specific area. The study suggests recommendations on what should be considered for possible statute that would serve in bid to ensure all rights and interests are considered, even in a case where there is a breach of contract. This study aims to not only reach the policy makers, but those who seek to partake such contracts in order to ensure they are fully aware of what they are getting themselves into and the various industries that stand to be affected like the medical industries through the clinics.

1.4 Statement of objective

Research aim; To investigate whether legislation should be applied in Kenya so as to benefit all involved in the process of surrogacy and in-vitro fertilization.

The following research objectives will be used in view of achieving the research aim stated above,

1. Analyzing the current practice of surrogacy in Kenya.
2. Identifying what rights and responsibilities should be accorded to the parties involved in the contracts of surrogacy and IVF and the remedies that can be accrued to them should there be a breach of contract.

¹⁵ <<https://becomeparents.com/>> on 17 January 2020.

3. To propose a legislative framework which can be applied to regulate the assisted reproduction in Kenya.

1.5 Hypothesis

This research is characterized by the hypothesis that in order for Surrogacy and IVF to exist in the country in a stable manner, then there should be more than just regulation in place to ensure all parties involved as well as industries affected are accorded rights, responsibilities along with remedies they can resort to.

1.6 Assumptions

This research study makes the assumptions that should there be a steady legal framework then this process could go through smoothly and benefit the country as well as avoid most disputes that would arise. Parties would enter into a contract fully aware of what they stand to gain and what they stand to lose as well as damages that may apply should the contract be breached.

1.7 Research questions

- ❖ What are the current legal provisions on surrogacy practice in Kenya and how do they fall short?
- ❖ What rights and responsibilities are due to all those involved with artificial reproduction?
- ❖ What statutes can be implemented to better regulate assisted reproduction in Kenya?

1.8 Literature Review

Looking at inability to bear children, it is not un-common that some couples have difficulties bearing their own children. In Africa however, the ridicule, humiliation and abused attached to infertility is a great deal.¹⁶ Nonetheless, with the strive to salvage the family name as well as their own, those who could not bear children of their own quickly resulted to traditional surrogacy.

With the fast-developing technology came about Surrogacy and In-Vitro Fertilization (IVF). This is a method that is fast growing in the globe and found its way to the country (Kenya). As it stands, there are two common types of surrogacy, that is the traditional surrogacy and the gestational surrogacy. The traditional surrogacy involves a spermatozoon from the intended father and an oocyte from the surrogate; in most cases fertilization is achieved through artificial

¹⁶ Masaku N, 'The Position of a Barren Woman in African Society with Special Reference to the Folktale Unyumbakatali' *University of South Africa*, 2018.

insemination or by intrauterine intervention.¹⁷ Gestational surrogacy on the other hand refers to where the implantation of the invitro-derived embryo created using either donated gametes or gametes from the intended parents; this type of surrogacy always requires medical intervention.¹⁸ Gestational surrogacy could further be divided into commercial surrogacy where consideration is given, and non-commercial surrogacy, where consideration is prohibited.¹⁹

It is however rather unfortunate that this process is not regulated in Kenya. As a result, the clinics gain the mandate of making decisions they should not be in a position to make. For instance, Kenya being a state that does not support same sex couples, these clinics have found a way around this by advising these couples to avoid making an appearance in the clinic as a couple. Instead, during consultations, they should endeavor to only have one representative.²⁰ The decision-making responsibility which ought to lie with the state is one of the reasons why we need regulation in the country, lest we forget the chaos brought about by lack thereof. With the view of establishing one, it is important to review various literature in bid to see how those in the developed countries went about making a law and their reasons behind the specific laws.²¹

Almeling in ‘the medical market for eggs and sperms’ stresses how this market is rapidly growing globally.²² Most of these markets are not regulated so you find that the prices are ridiculously high, which is rather unfortunate for the buyers who did not choose their situation. Bhatia in ‘the surrogate pregnancy’ writes a guide to the clinicians that they should follow in order to have a problem free surrogate pregnancy, which includes ensuring there is insurance.²³ Seeing that there are some risks that cannot be foreseen, the insurance would then help cushion the process should there be urgent need for funds. Legarre go stated that unjust

¹⁷ Bhatia K, Martindale E, Rustamov O & Nysenbaum A, ‘Surrogate Pregnancy: an essential guide for clinicians’ 11 *The Obstetrician and Gynaecologist Journal* 1, 2009, 50.

¹⁸ Norton W, Hudson N & Culley L, ‘Gay men seeking surrogacy to attain parenthood’ *Reproductive Biomedicine Online Journal*, 3, 2013 -<<https://www.rbmojournal.com/action/showPdf?pii=S1472-6483%2813%2900180-6>>- on 21 December 2020.

¹⁹ Rozee V, Unisa S & Rochebrochad E, ‘The Social Paradoxes of Commercial Surrogacy in developing Countries,’ *BMC Women’s Health*, 2019<<https://bmcmwomenshealth.biomedcentral.com/articles/10.1186/s12905-020-01087-2#citeas>> on 26 January 2021.

²⁰ <<https://becomeparents.com/>> on 9 September 2020.

²¹ ‘Intended Parents’, <<https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/what-are-the-international-surrogacy-laws-by-country/>> on 9 September 2020.

²² Almeling R, ‘*Sex Cells: The medical market for eggs and sperms*’, University of California Press, 2011.

²³ Bhatia K, Martindale E, Rustamov O and Nysenbaum A, ‘*Surrogate pregnancy: an essential guide for clinicians*’ <<https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1576/toag.11.1.49.27468>> on 04 January 2020.

laws are a form of laws that have been watered-down.²⁴ These laws only serve one's private needs and not the society as a whole. This process does not only involve one person. This brings in the importance of having proper statute in place to regulate these laws.

It is without doubt that there is need for there to be regulations when handling matters affecting the society. Thus, there being no provisions in our society with regards to surrogacy and IVF creates a huge gap. If the need for this process to be undertaken in a smooth and stress-free manner in order to satisfy those involved is a possibility we are inclined to, then the best way to avoid this chaos is by having just laws in place in order to regulate this process. However, the law does not provide an answer to everything. So, what then happens in an instance where new cases arise that have not been tackled before? Should this process even be one that should be promoted? Take for instance Germany and France, they see surrogacy as using one person as a means to the other's end, thus to them it is objectifying and a violation to women's dignity.²⁵

The later view is broadly explained by Bromfield and Rotabi as they seek to bring out the complexity surrounding surrogacy and IVF; such as concerns on the well-being of those involved, the surrogate as well as the child's welfare, exploitation of surrogates, baby-selling, commodification of women, invasion of the marketplace into the family realm which has long since time immemorial been regarded to as sacred, not forgetting questions related to parentage and citizenship.²⁶ Surrogacy, though it gives many the joy of motherhood clearly also has feet of clay that cannot be ignored. South Africa seems to take note of these as they have mostly addressed the same in its regulations. For instance, they ban commercial surrogacy which mitigates the complexity around the process being seen as a baby-selling initiative or exploitation of surrogates, it just makes it about one person, willing to help another have a child. The welfare of all parties, including parentage and citizenship is as well accounted for, and there are regulations which provide for their rights and responsibilities. Their judicial system as well brought out several advancements in their regulations for instance requiring an affidavit from the clinics with particulars of the process including how the applicant parents were connected to the surrogate mother; in addition, artificial fertilization cannot take place

²⁴ Legarre S, '*Derivation of Positive from Natural Law*', Notre Dame Law School, 2012.

²⁵ Fenton-Glynn C, 'Surrogacy; why the world needs rules for 'selling' babies' <<https://www.compellingtruth.org/birth-defects.html>> on 6 December 2020.

²⁶ Bromfield N & Rotabi K, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations', *Global Social Welfare*, 1, 2014.

before the agreement is confirmed by the High Court.²⁷ In my opinion these among other regulations by the South African approach to surrogacy makes it a viable and suitable option for those seeking to bear children through surrogacy. Kenya should definitely emulate and strive to have a regulatory framework of its own. Seeing as even the Judiciary brought out the great need for legislation in the case *JLN, WKN & CWW v the Director of Children's Services & 4 others*.²⁸ Despite there being regulations that touch on matters surrogacy in Kenya, they still fail to address pertinent issues such as parental orders as well as the rights and responsibilities to be enjoyed by the parties. Kenya should not be comfortable with the Bill as it stands, not to be ignorant of the stages required by law before an Act comes to being, this is a wakeup call that this is an area which needs attention and should be treated with urgency.

1.9 Theoretical Framework

The definition of surrogacy has already herein been established. In most cases, the surrogate receives huge compensation as well as other benefits such as housing during the term of pregnancy and healthcare during the pregnancy and in certain instances this could go as far as healthcare even after the pregnancy.²⁹ Some choose to look at this as a means of objectifying women and are therefore against the act.³⁰ To others, this is not so much about the women, but about the children who in their eyes, are the ones being commodified; they see it as selling babies.³¹ However, those on the other side of this spectrum, referring to the supporters of surrogacy and more so the contracting parents themselves see this as an opportunity. To them, this is their light at the end of the tunnel after several failed attempts at having their own child.³²

There are obviously very many other views on matters surrogacy. However, what seems to be the underlying factor in all this is surrogacy as a human act and whether it should be encouraged or shunned with regards to it being right or wrong. This brings us to ethics and morality. Morality is said to be a system of character and virtues which revolve around a distinction of what is right and what is wrong; this may however be very subjective as people's practices and

²⁷ Sloth-Nielsen J, 'Surrogacy, South African Style' University of the Western Cape, Cape Town, 2013.

²⁸ (2014) eKLR.

²⁹ Dale-Moore R, 'A Consideration of International Surrogacy under Act-Utilitarian Ethics' 1 *Sound Decisions: An Undergraduate Bioethics Journal* 1, 2015,1.

³⁰ Bromfield N & Rotabi K, 'Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations', *Global Social Welfare*, 1, 2014.

³¹ Fenton-Glynn C, 'Why there should be rules on selling babies', < [Surrogacy: Why the world needs rules for 'selling' babies - BBC News](#)> on 12 December 2020.

³² Masaku N, 'The Position of a Barren Woman in African Society with Special Reference to the Folktale Unyumbakatili' *University of South Africa*, 2018.

beliefs vary from community to community.³³ Ethics is based on principles of what is right and what is wrong which dictate human actions.³⁴ Laws are in some cases considered as being codifications of certain ethical values meant to help regulate society, and also impact decision-making. Thus, and on this note two theories which touch on ethics and morality have been selected to help shed light as well as analyse the objectives of this research and answer the corresponding questions; the theory of utilitarianism and the social contract theory.

a.) Theory of Utilitarianism

This theory suggests that in order to determine whether an act is wrong or right then we should look at its results. That is to say, that an action is considered as being right if it results to the greatest amount of happiness to the greatest number of people.³⁵ With respect to this, we see that what carries most weight in determining whether an act is wrong or right when it comes to human conduct is its resultant factor. John Stuart Mill stresses on the same, just for the purposes of reiteration, that an act is right if it leads to the greatest happiness to the most people.³⁶ Noting that everyone's happiness counted equally, Bentham also stressed that these principles should be applied when making laws for them to be considered as just.³⁷

That being said, it is therefore safe to say that from a utilitarian point of view, to be able to conclude whether or not an act is permissible and or right, one should weigh its outcomes. In the case of surrogacy, those directly involved are the applicant parents, the surrogate herself, the child being sought, and the medical practitioners involved in executing the process. As it appears from the face of it, all seem to gain from this process. The contractors gain the child making their family complete, the surrogate is given consideration for the part she played, and the medical practitioners gain their medical fee. A downside to this practice would be in a scenario where a bond is developed between the surrogate and the foetus, therefore making it hard for the surrogate to give the child up after birth. In such a case, the solution should consider whether the greatest number of people leave the process happy, after a wholesome examination of the outcome.³⁸

³³ Rachels J & Rachels S, *'The elements of moral philosophy'* 7th ed, McGraw Hill, New York, 2012.

³⁴ Velasquez M, Andre C, Shanks T & Meyer M, 'What is Ethics?' Santa Clara University, 2010.

³⁵ Sidgwick H, 'The meaning of Utilitarianism' Sophia Project Ethics Archives.

³⁶ Macleod C, 'John Stuart Mill: Mill's Conception of Happiness' Stanford Encyclopaedia of Philosophy, 2016.

³⁷ Rosen F, 'Bentham and Mill on Liberty and Justice' in Feaver G & Rosen F *'Lives, Liberty and the Public Good'* 3rd ed, Palgrave Macmillan, London, 1987, 121.

³⁸ Dale-Moore R, 'A Consideration of International Surrogacy under Act-Utilitarian Ethics' 1 *Sound Decisions: An Undergraduate Bioethics Journal* 1, 2015,1.

b.) The Social Contract Theory

This is a theory attributed to Thomas Hobbes, which suggests that morality or ethics are a set of rules agreed upon by the individual and that agreement is what acts as the source of their authority.³⁹ This theory is based on the tendency of man to be selfish and self-centered and act in ways which only promote their own interests; leading to clashes in the society.⁴⁰ In order to avoid this, it is then necessary to establish laws and social contracts which are binding and would regulate the society's conduct in order to ensure harmony prevails.⁴¹ This being the current case in Kenya whereby there is yet to be any binding law or social contracts on surrogacy.

There could be various complications that could arise from this case, that is a country not having legislation to control surrogacy. For instance, where the child is born with disabilities and the contractual parents decide to back out, what happens then? This is similar to the case of baby Gammy where Gammy was born with Down Syndrome in Thailand and there were controversies of the parents deciding to abandon the child and the surrogate refusing to release the child to the contractual parents.⁴² Unfortunately, this is not the only case, there are several instances where the parents decide that they only want to take the healthy child.⁴³ In addition, the surrogate could also encounter medical complications during the pregnancy, unimaginable discomfort and the emotional damage that pregnancy causes to some women.⁴⁴ All in all, some of these and other complications could be sorted by law, but seeing as there is no law, the decision lies in the parties who could only be out for their own personal needs.

In conclusion, from these theories we see what should be considered before ruling surrogacy as right or wrong, and as well why law is vital and what should be considered in the making of such law. Noting that the law in most cases incorporates ethical standards within which the

³⁹ Laksar M, 'Summary of the Social Contract Theory by Hobbes, Locke and Rousseau' Symbiosis International University, 2013.

⁴⁰ Hobbes T & Curley E, '*Leviathan: with selected variants from the Latin*' 2nd ed, Hackett Publishing Company, Indianapolis, 1994, 71.

⁴¹ Rachels J & Rachels S, '*The elements of moral philosophy*' 7th ed, McGraw Hill, New York, 2012.

⁴² This case was however later cleared that the parents did not leave the child because he was impaired but because the surrogate mother had refused to release the boy child and only released the twin sister. <<https://www.dailymail.co.uk/news/article-7712763/Baby-Gammy-five-years-David-Farnell-sues-asbestos-poisoning.html>> on 12 December 2020.

⁴³ Richards B, "'Can I take the normal one?'" Unrelated Commercial Surrogacy and Child Abandonment' 44 *Hofstra Law Review* 1, 2015.

⁴⁴ Purdy L, 'Surrogate Mothering: Exploitation or Empowerment' in Vaughn N '*Bioethics: Principles, Issues and Cases*' 2nd ed, 2013, 454.

citizens subscribe to,⁴⁵ these theories shall therefore be applied in the rest of the study while we analyse the current state of Kenya on matters surrogacy and IVF as well as the attempt on coming up with a legal framework for surrogacy in Kenya.

1.10 Delimitations

This study will not include interviews and or a review of the interviews of the sectors involved in artificial reproduction, or surrogates, applicant parents and children who resulted from this contract. This is majorly because the time frame allocated is rather minimal.

1.11 Research Methodology

Due to the time allocated to this study, the research design applied will broadly be based on desktop research, acquiring the data from partially visiting the library and doing online research. The research methodology used in this study will revolve around doctrinal research in law where it looks at primary sources such as the statutes from Kenya as well as other countries which have statute on the matter in question and case laws, as well as secondary sources like journals, newspapers, and online internet resources. It will also dive into a qualitative analysis of the same with regards to how they are a function of society and its impact; with the view of properly coming up with a legislation proposal. A comparative study of South Africa is seemingly important seeing that they have been conducting surrogacy for a long time and have acquired a ton of experience in the matter; they in this sense have a legislation they have been using which in my opinion has positively impacted the process.

1.12 Chapter Breakdown

Chapter 1: Introduction

This section of the study provides a background on the study as well a statement of the problem with regards to surrogacy and IVF. It similarly contains the general aims of the study, the hypothesis, the research question, a justification of the study and literature review on the same as well as a theoretical framework which provides a perspective on examining the topic. It concludes with the delimitations, research methodology and chapter breakdown.

Chapter 2: The legal framework governing surrogacy and IVF in Kenya

⁴⁵ Velasquez M, Andre C, Shanks T & Meyer M, 'What is Ethics?' Santa Clara University, 2010.

This chapter provides a discussion on the current situation in Kenya with regards to surrogacy and IVF. The logic of this chapter is that with an understanding of what currently takes place in the country, then we will be able to pin-point the flaws of the current system of surrogacy and IVF as well as exactly what needs our attention, more so with regards to providing a legislative framework.

Chapter 3: Benchmarking South Africa's Legal Framework for Surrogacy

This chapter will benchmark the various statutes by South Africa in their provision as well as their application in order to see their effectiveness. This will form basis for recommendation of Kenya's statute proposal. The logic behind this is that by looking at the provisions already put in place in a different country, in comparison to the implications provided in the previous chapter then regulations are conceivable. Similarly, South Africa is the best fit since we have already borrowed laws pertaining to the family from them such as the Marriage Act. It will also include the South Africa's Judicial approach to surrogacy.

Chapter 4: The Significance and Proposal of a Regulatory Framework for Artificial Reproduction

This chapter will first look at the importance of a regulatory framework governing surrogacy and IVF in a state, thereafter, it will take notice of and recommend the rights, remedies and responsibilities of the parties involved in surrogacy and IVF in view of making recommendations on a legal framework that can be put in place to help the process of surrogacy and IVF run smoothly.

Conclusion and findings

The study will then make its conclusion which will entail a summary of findings in relation to the study.

CHAPTER II: LEGAL FRAMEWORK GOVERNING SURROGACY AND IVF IN KENYA

2.1 Introduction

'After two years of marriage and failure to give birth, I was tormented and abused in my marriage and my parents-in-law tried forcing me to leave their son so he can marry someone who will give him children'⁴⁶

The above quotation is the bitter truth of Jedisah from Kisumu Dogo. Sad but true, she is not the only one undergoing that experience. In Kenya, women are constantly losing their marriages due to infertility.⁴⁷ More often than not, we hear of and congratulate women who are expectant. However, what seems to be swept under the rug, are those who are infertile. We are always quick to support the expectant women while those experiencing distress out of their infertility are left in isolation.⁴⁸ Particularly in Africa, procreation is believed to be the main purpose of the institution of marriage; in the traditional life, it was held in such high esteem that those who were unable to bare their own children suffered humiliation, ridicule and in the extreme cases, abuse.⁴⁹ Just like Jedisah. This is not to say that infertility is only faced by women, men too have trod this path.⁵⁰

In effort to salvage the situation, women would look for co-wives who would bear children on their behalf; this is a scenario of the traditional type of surrogacy.⁵¹ From this we see that surrogacy in general is definitely not a new concept. What makes it relatively complicated is the improvements technology has brought to it, and how extensive it has become.⁵² Ordinarily, to adopt a child would have been the best viable option for those seeking to have a 'family'. However, the process of adoption as portrayed by the Children's Act,⁵³ is one which most see

⁴⁶ Words by Jedisah from Kisumu Dogo slums during an interview with Diana Wanyonyi <<https://www.dw.com/en/the-77-percent-silent-struggle-of-infertility-in-kenya/av-42470611>> on 21 December 2020.

⁴⁷ < <https://www.dw.com/en/the-77-percent-silent-struggle-of-infertility-in-kenya/av-42470611> > on 21 December 2020.

⁴⁸ 'An open letter to women struggling with infertility' < <https://mumsvillage.com/bloggers/mara-letter-women-struggling-infertility/> > on 21 December 2020.

⁴⁹ Masaku N, 'The Position of a Barren Woman in African Society with Special Reference to the Folktale Unyumbakatili' *University of South Africa*, 2018.

⁵⁰ Odek A, Masinde J & Egesah, 'The Predisposing Factors, Consequences and Coping Strategies of Infertility in Males and Females in Kisumu District, Kenya' 2016.

⁵¹ Masaku N, 'The Position of a Barren Woman in African Society with Special Reference to the Folktale Unyumbakatili' *University of South Africa*, 2018.

⁵² Norton W, Hudson N & Culley L, 'Gay men seeking surrogacy to attain parenthood' *Reproductive Biomedicine Online Journal*, 3, 2013 -<<https://www.rbmojournal.com/action/showPdf?pii=S1472-6483%2813%2900180-6>>- on 21 December 2020.

⁵³ Part XII, *the Children's Act*, CAP 141.

as too lengthy a process, and with the want of having a child with one's own genetic make-up, invalidates this option.⁵⁴ Those who can afford run to surrogacy, thus the purpose of this chapter is to give an overview of the current situation in Kenya.

2.2 The practice of surrogacy in Kenya

As stated above, surrogacy is not a new process in Kenya. This is with strict reference to traditional surrogacy. However, with the evolving technology, we can then refer to it as a relatively new process in the country, with the first gestational surrogacy birth having occurred in 2007.⁵⁵

The Process of surrogacy practice in Kenya could be summarized as follows;

The applicant parents are established as candidates for a surrogate by the fertility centre and thereafter taken through an in-house counselling process. In this process, they are given details of the process as a whole, and advised on the risks and benefits attached to it. They decide whether they want to use their own gametes or use those from donation and are given details of the potential surrogates, from which they are required to select their surrogate mother.⁵⁶ In order to become a surrogate mother, there are various requirements that need to be fulfilled first. These are; you have to be between the age of 21 to 28 years, should not have any premedical or mental health condition, should be transparent and honest about one's medical history and background, should not be an addict of alcohol and smoking, should have carried a successful pregnancy in the past as well as should be ready for all the diagnosis and screenings as required by the medic.⁵⁷ The surrogate mother is thereafter contacted, and a formal introduction is done between the parties. Their rights and duties are made known to them and a contract is drafted where they are each expected to sign before the medical process can commence.⁵⁸

Upon birth, the registration of the children follows the normal process of birth registrations.⁵⁹ This involves a notice of birth being issued by the medical practitioner present indicating details of the newly born such as the name and sex of the baby, the date of birth and the name

⁵⁴ Chadwick R, 'Having children: Introduction' in Chadwick R *Ethics, Reproduction and Genetics Control*, London Croom Helm, 2004.

⁵⁵ < <https://www.growingfamilies.org/surrogacy-in-kenya/> > on 22 December 2020.

⁵⁶ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

⁵⁷ 'Surrogacy in Kenya' < <https://www.growingfamilies.org/surrogacy-in-kenya/> > on 24 December 2020.

⁵⁸ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

⁵⁹ As stipulated by the *Births and Deaths Registrations Act*, CAP 149.

of the mother.⁶⁰ The name of the father is usually not entered unless with joint agreement of both parents, evidence of marriage between the mother and father or should a recognized custom prescribe that the father's name is indicated.⁶¹ With respect to this requirement by law, then most times the surrogate is the one indicated as the mother of the child upon birth.⁶² The applicant parents would thereafter be required by law to proceed by legally adopting the child from the surrogate.⁶³

2.3 The legal framework on surrogacy in Kenya

With the overview of how the process of surrogacy takes place, this section intends to bring out how various legal frameworks in Kenya, although not specific to surrogacy, accommodate surrogacy and IVF.

a) The Constitution of Kenya

With regards to the IVF, the constitution goes ahead to make a provision for the right to proper healthcare services including that of the reproductive health, giving applicant parents the right to access technologies such as the IVF.⁶⁴ These rights being largely applicable to the applicant parents. The constitution only speaks to the family as a fundamental unit of the society, however, in most African societies a family without a child is considered incomplete; interpreting this right in an African society creates the necessity of a child with view of having a complete family.⁶⁵

The children have also been provided for. The constitution stipulates that in every matter concerning the child, the child's best interest ought to be considered. The same goes for the child's right to a name and nationality, parental care, healthcare, as well as protection from abuse and inhumane treatment.⁶⁶ This right was upheld by the courts as well, in a case that is herein further discussed, whereby the director of children's services had directed the hospital to take twins who were born premature in a surrogacy agreement to a children's home. The court however held that the children should stay in hospital seeing that they were born

⁶⁰ Section 7, *Births and Deaths Registration Act*, CAP 149.

⁶¹ Section 12, *Births and Deaths Registration Act*, CAP 149.

⁶² <<http://wiredspace.wits.ac.za/bitstream/handle/10539/18501/TOWARDS%20A%20KENYAN%20LEGAL%20AND%20ETHICAL%20FRAMEWORK%20ON%20SURROGACY%20-%20778951.pdf?sequence=1>> on 22 December 2020.

⁶³ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

⁶⁴ Article 43(1), *Constitution of Kenya* (2010).

⁶⁵ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

⁶⁶ Article 53, *Constitution of Kenya* (2010).

premature, it was in their best interest as well as it was within their rights to attain proper healthcare.⁶⁷

In addition to the above, the constitution as well provides for the right to dignity⁶⁸ and that of privacy which protects the people's private affairs from being revealed and or unnecessarily required or revealed.⁶⁹ This goes a long way in protecting the rights of both the applicant parents as well as the surrogate to enter into a surrogacy agreement, and keep their affairs privileged.

The right of access to information has similarly been provided by the constitution.⁷⁰ The role of this right when it comes to surrogacy is that the parties thereby have the right to be informed of the procedure before it commences, as well as clarify any questions they may have. The Health Act as well upholds this right by requiring the organs to comprehensively communicate all health functions they are responsible for.⁷¹

b) The Children Act

To begin with, the Children's Act reiterates the fact that the best foot forward when it comes to matters relating to a child, is the child's best interest.⁷² In addition, it goes further to provide for the office of the Director of Children's Services,⁷³ whose duty is to protect and promote children's welfare.⁷⁴

Along with, as seen from the surrogacy process above, as per the current framework governing surrogacy, adoption is one of the options availed to the applicant parents to gain parental custody of the child. This Act provides for the procedure to be followed whilst adopting a child.⁷⁵ First and foremost, it is important to note that the court that deals with matters adoption is the High Court, and all matters concerning the same are heard in the chambers, with the identity of the parents and more so the child held confidential.⁷⁶ To begin with, the adoption process will not commence until the child is at-least six weeks and declared to be free for

⁶⁷ *JLN, WKN and CWW v Director of Children's Services & 4 others* (2014) eKLR.

⁶⁸ Article 28, *Constitution of Kenya* (2010).

⁶⁹ Article 31, *Constitution of Kenya* (2010).

⁷⁰ Article 35, *Constitution of Kenya* (2010).

⁷¹ Section 10, *the Health Act* (Act No. 21 of 2017).

⁷² Section 4, *the Children Act* (Act No. 12 of 2012).

⁷³ Section 37, *the Children Act* (Act No.12 of 2012).

⁷⁴ Section 38, *the Children Act* (Act No. 12 of 2012).

⁷⁵ Part XII, *the Children Act* (Act No. 12 of 2012).

⁷⁶ Section 154, *the Children Act* (Act No. 12 of 2012).

adoption by the National Adoption Society.⁷⁷ The child should as well be in the care of the adoption applicant for a period of not less than three months before the process can start,⁷⁸ and visits by the representative of the society or the director at-least once every month.⁷⁹ Those seeking the adoption orders should be the age of twenty-five and over but not older than the age of sixty-five years. A cap is also given on sexuality, whereby those seeking to adopt should not be homosexual.⁸⁰ In a case where the adoption applicants are couples, the two are expected to be married,⁸¹ and the marriage should have been in effect for at-least three years before the adoption process begins.⁸² On the same note, a single male cannot adopt a female child, the same goes for a single female seeking to adopt a male child, they can however.⁸³

c) The Births and Deaths Registration Act

This Act, as was addressed above, speaks to the particulars of the registration of a newborn baby. In that, it requires a notice of birth which is issued by the medical practitioner present indicating details of the child.⁸⁴

d) The Health Act

The Health Act requires information relating to a person's health status or treatment, confidential.⁸⁵ This information may be disclosed should there be a court order in place, where it poses a threat to the public, or by the consent of the patient.⁸⁶ In this case, the parties involved in the surrogacy agreement have the right to keep their agreement confidential. This right may only be breached where the Act permits. It is similarly important to note that consent does not only extend to the dissemination of private health information in this Act, but also encompasses consent with regards to the procedures and other health services provided to a patient.⁸⁷

The regulation of health products and technologies has as well been established by the Health Act.⁸⁸ The regulatory body established has various duties which include but are not limited to

⁷⁷ Section 156(1), *the Children Act* (Act No. 12 of 2012).

⁷⁸ Section 157(1), *the Children Act* (Act No. 12 of 2012).

⁷⁹ Regulation 31, *the Children Adoption Regulations* (2005).

⁸⁰ Section 158, *the Children Act* (Act No. 12 of 2012).

⁸¹ Section 158(3), *the Children Act* (Act No. 12 of 2012).

⁸² Regulation 19, *the Children Adoption Regulations* (2005).

⁸³ Section 158(2), *the Children Act* (Act No. 12 of 2012).

⁸⁴ Section 7, *Births and Deaths Registration Act*, CAP 149.

⁸⁵ Section 11, *the Health Act* (Act No. 21 of 2017).

⁸⁶ Section 11, *the Health Act* (Act No. 21 of 2017).

⁸⁷ Section 9, *the Health Act* (Act No. 21 of 2017).

⁸⁸ Section 62, *the Health Act* (Act No. 21 of 2017).

licensing health products and health technologies as well as controlling the clinical trials.⁸⁹ Seeing that the practice has proved to, in most cases, give what it promises and is relatively safe as the Act conditions for any health service or technology used,⁹⁰ then surrogacy and IVF are still being offered to those who seek it.

It goes further to speak to the donation of human organs, tissues, and other gametes where it stipulates that none of the mentioned shall be removed from a person with the view of donating except with proper authorization from either the medical practitioner in-charge of the hospital or the person making the donation.⁹¹ This protects those who seek to donate sexual gametes to the course. On the case of the surrogate, some may say that in commercial surrogacy she is renting her womb out to the applicant parent, however, in non-commercial surrogacy we see this as a form of organ donation where the surrogate donates her womb to the applicant parent for the duration of the pregnancy.⁹²

e) The Contract Act

Moreover, after the parties are clear with each other with respect to their expectations and responsibilities, the lawyer drafts an agreement stipulating the same where both the surrogate and applicant parents are required to sign, thereafter the agreement is commissioned and notarized.⁹³ This follows the requirement given in the contract law which provides that certain agreements should be in writing.⁹⁴ A finding in the *ex-parte matter between WH and others* was mentioned in the case *AMN & 2 others v the Attorney General & 5 others* which required the acknowledgement of the surrogacy agreement by the superior court in order to ascertain the position of the applicant parents, with respect to indicating their names on the birth certificate.⁹⁵

f) The Reproductive Health Bill

Despite Kenya's lack of a regulatory framework on surrogacy, there have been steps towards attaining one. One of which is the Reproductive Healthcare Bill.⁹⁶ To begin with, it provides

⁸⁹ Section 63, *the Health Act* (Act No. 21 of 2017).

⁹⁰ Section 66, *the Health Act* (Act No. 21 of 2017).

⁹¹ Section 80, *the Health Act* (Act No. 21 of 2017).

⁹² Mason M & Ekman T, 'Renting a Womb: Surrogacy and the rights of the child' <<https://www.paulekman.com/blog/rent-a-womb/>> on 19 January 2020.

⁹³ Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.

⁹⁴ Section 3, *the Contract Act*, CAP 23.

⁹⁵ *AMN & 2 others v the Attorney General & 5 others* (2015) eKLR.

⁹⁶ *The Reproductive Healthcare Bill*, 2019.

for the right of every person to assisted reproduction.⁹⁷ Consent should also be provided by the donors of the sexual gametes so as to the use of these gametes (the gametes should be stored for less than ten years)⁹⁸ and those seeking assisted reproduction such as having their embryos frozen or IVF.⁹⁹ This consent can be withdrawn at any time before implantation.¹⁰⁰ Similarly worth noting, is that this bill does not advocate for commercial surrogacy.¹⁰¹

With respect to entering into a surrogacy agreement, the applicant parents should not be able to have any child of their own, and they should be between the ages of twenty-five and fifty-five. They should be in a position, with all respects, to accept parenthood of the child sought, and as well understand the legal consequences of such an agreement.¹⁰² The surrogate should be at-least twenty-one years of age and understands as well as accepts her responsibilities in the agreement.¹⁰³ The surrogacy agreement should be in writing and signed by all parties as well as witnessed, entered into in Kenya, and ought to entail provisions capturing the best interest of the child, with respect to his/her upbringing and his/her position in the event of deceased parents, separation or divorced parents.¹⁰⁴

The bill provides for parental orders in that it indicates that the applicant parents shall upon birth be the legal parents of the child, and should not reject the child.¹⁰⁵ With respect to citizenship, the child as well acquires the citizenship of the applicant parents.¹⁰⁶

Lastly, it goes further to provide for the termination of the agreement in that the surrogacy agreement may be terminated whereby the pregnancy is terminated, where a conflict with respect to the agreement occurs but before implantation occurs; noting that the agreement may only be terminated before implantation.¹⁰⁷

The various laws discussed above portray that there are legal provisions that applicant parents as well as surrogates can rely on when seeking to have a child through surrogacy and IVF. Factors such as privacy are seen to be provided for throughout. Adoption, which can be used by the applicant parents to attain legal parenthood, is seen to be a rather lengthy process.

⁹⁷ Section 9, *the Reproductive Healthcare Bill* (2019).

⁹⁸ Section 11, *the Reproductive Healthcare Bill* (2019).

⁹⁹ Section 10, *the Reproductive Healthcare Bill* (2019).

¹⁰⁰ Section 10(4), *the Reproductive Healthcare Bill* (2019).

¹⁰¹ Section 22, *the Reproductive Healthcare Bill* (2019).

¹⁰² Section 14(b), *the Reproductive Healthcare Bill* (2019).

¹⁰³ Section 14(c), *the Reproductive Healthcare Bill* (2019).

¹⁰⁴ Section 15, *the Reproductive Healthcare Bill* (2019).

¹⁰⁵ Section 19, *the Reproductive Healthcare Bill* (2019).

¹⁰⁶ Section 21, *the Reproductive Healthcare Bill* (2019).

¹⁰⁷ Section 18, *the Reproductive Healthcare Bill* (2019).

Recalling the fact that they should be living with the child for at least three months before the process can begin; it is as well said that it takes approximately six-months for the adoption process to end. This creates room for corruption to try to hasten the process, it also is a form of trial and error with the child expected to live with the applicant adopting parents for three months which is not in their best interest.¹⁰⁸ Though corruption to hasten the process has been cited as an offence under the Children Act,¹⁰⁹ it does not make the process any easier. Similarly, as it stands, the children's act says nothing as to matters concerning children born out of surrogacy. The legislation is as well completely silent on the subject of storing and disposing of the donated gametes. The proposed bill however accounts for the donors of gametes who are sometimes overlooked. As seen above, it has a provision for their informed consent, as well as a cap on how long these gametes should be stored for before they are used. However, what then should happen to the gametes once they surpass the said duration of ten-years and can no longer be used.

2.4 Bended and Broken Rules

A few backdoor procedures are involved in the process as well. Seeing as the surrogacy process is not regulated in Kenya, the process has become highly self-regulated. For instance, Kenya does not advocate for same-sex couples. The constitution specifically provides that every adult has the right to marry a person of the opposite sex.¹¹⁰ The agencies however have found a way around this. As herein mentioned, the clinics advise the same-sex couples not to portray themselves as such during the process; only one partner should conclude the surrogacy contract and he or she should not quote his or her sexual orientation.¹¹¹

Another one of the illegal operations happening behind closed doors is the attempt to avoid having to go through the legal process of changing the names on the birth certificate. Surrogates go through the process using the identity of the intended mother so that at birth, it is her name written on the birth certificate.¹¹² This qualifies as fraud by the parties to the contract which is an offence as per the penal code.¹¹³

¹⁰⁸ 'The Adoption Process in Kenya: What You Need to Know' <<http://kibatiaadvocates.com/the-adoption-process-in-kenya/>> on 21 January 2021.

¹⁰⁹ Section 179(1), *the Children Act* (Act No. 12 of 2012).

¹¹⁰ Article 45(2), *Constitution of Kenya* (2010).

¹¹¹ 'Surrogacy in Kenya for same sex couples' < [¹¹² Robai A, 'Towards A Kenyan Legal and Ethical Framework on Surrogacy' Unpublished LLM Thesis, University of the Witwatersrand, May 2015.](https://www.ivfconceptions.com/surrogacy-in-kenya/#:~:text=The%20surrogate%20mother%20should%20be,according%20to%20their%20citizenship%20law.> on 22 December 2020.</p></div><div data-bbox=)

¹¹³ Section 348, *Penal Code*, CAP 63,

2.5 The Kenya judiciary approach to surrogacy

Having no laws calls for everyone to be their own law maker, as well as placing decisions on the hands of people who have no business whatsoever with making those decisions, furthermore, they happen to be short-sighted as to the effects of their decisions. Nonetheless, the judiciary has been seen to shed some light on matters surrogacy quite a few times. Just to mention a couple of cases;

*a.) JLN, WKN & CWW v the Director of Children's Services & 4 others*¹¹⁴

In most instances, when you hear of a feud in matters surrogacy, the mind tends to shift to either a surrogate refusing to let the child go or the parents refusing to take the child after the baby is born with deformities. This case however brought out a different aspect of dispute that may arise. In this case, the petitioners were the parties to the surrogacy agreement, that is, the applicant parents and the surrogate mother. They got into a surrogacy agreement where IVF was used to implant the embryo of WKN and CWW in JLN. Both parties seemed to have held their end of the bargain, but there seemed to be a confusion on the part of the medics as to whose name to put on the birth certificate. The hospital called the Director of Children's Services who then advised that the twins, who were born premature, should be placed in a children's home believing that they needed protection and care. There were as well questions as to the right to privacy which should have been accorded to the petitioners' decision to engage in surrogacy, and whether the hospital breached their privacy while engaging the Director of Children's Services. It was however held in favor of the petitioners.

Justice Majanja held that the twins should stay in the hospital seeing that they were born premature until the biological parents could take them home. With regards to the question on breached privacy, the Justice Majanja stated that the hospital was not in breach, they acted accordingly by seeking a way forward from the Director of Children's Services owing to the fact that we are yet to have a legislation in place to guide all parties involved. He stressed as well that in order to avoid conflicts like these, there is a great need for a legislation that will help the process of surrogacy run smoothly.¹¹⁵

*b.) AMN & 2 others v the Attorney General & 5 others*¹¹⁶

¹¹⁴ (2014) eKLR.

¹¹⁵ *JLN, WKN and CWW v Director of Children's Services & 4 others* (2014) eKLR.

¹¹⁶ (2015) eKLR

This is yet another significant case which spoke to the Kenyan position on matters surrogacy, especially when it comes to the legal parenthood of the child. In this case, the applicant parents and the surrogate entered into a surrogacy agreement, where they used a donated female gamete and the sperm of the applicant father. When the child was born, the question as to who's name should be used on the birth certificate arose. After taking advice from the Attorney General, the hospital issued birth certificates with the applicant parents named as the parents of the twins. The Attorney General gave this advice seeking to spare them the hustle of the adoption process. Later on, the family tried seeking citizenship of United Kingdom but were denied on the grounds that the information on the birth certificates were false. According to the UK office, there was no way under the Kenyan law that they could obtain lawful parenthood. They were advised to adopt the children instead. Thereafter, the applicant parents petitioned the High Court seeking to have the birth certificate cancelled and be allowed to adopt the twins.

It was held that the Attorney General's advice was wrong and that the birth certificates should be cancelled and have the surrogate mother keyed in as the legal mother of the twins in their certificates the applicant parents would thereafter proceed to make an application to adopt the twins from the surrogate mother. This case established the procedure to be followed on matters surrogacy. Owing to the fact that we are yet to have parental orders. They followed the birth and deaths registration Act definition where at birth the mother is the one who gave birth to the child¹¹⁷ and the only viable option for the applicant parents would have to be adoption.¹¹⁸

2.6 Conclusion

Judging from as herein discussed, especially from the manner in which the practice takes place in Kenya, we can see that the process is largely extra-legal; which seems to be a workable system to some extent. We cannot however turn our backs to the controversies present. Saying that there are some bended rules and others broken is not to say that everyone who takes part in this process chooses the easier way out. We all know that some people will always do what is right while some do not mind doing what is wrong if it makes their life slightly easier.

Remember, as was discussed above on morality; it is a system of character and virtues which revolve around a distinction of what is right and what is wrong and may be very subjective as people's practices and beliefs vary from community to community.¹¹⁹ Nonetheless, we cannot

¹¹⁷ Section 2, *Births and Deaths Registration Act*, CAP 149.

¹¹⁸ Kimani S, 'Case Report: A.M.N & 2 Others v Attorney General & 5 Others (2015) eKLR: A Review Of The Kenyan Position On Surrogacy' Africanlii.org, 2019.

¹¹⁹ Rachels J & Rachels S, *The elements of moral philosophy* 7th ed, McGraw Hill, New York, 2012.

wholly blame them. We can however blame it on the fact that the practice is not regulated, which opens an opportunity for them to do so. Also resultant from the fact that one person cannot change the character and virtues of the other, we can only seek to stop them from doing what is wrong.¹²⁰ What better way to do this than ensuring that there is a system in place to keep them in check? This leads us to the next section of the study where the study will attempt to provide a shield for those involved by looking into a State which has a regulatory framework on the matter at hand.

¹²⁰ Legarre S, 'The Virgin Mary in the Temple of Justice' Notre Dame Law School, Notre Dame Law School Legal Studies Research Paper No. 1765, 2014.

CHAPTER III: BENCHMARKING SOUTH AFRICA'S LEGAL FRAMEWORK FOR SURROGACY.

3.1 Introduction

This chapter seeks to give a comparative study of South Africa's regulatory framework on surrogacy agreements. This will be achieved by looking at the Children's Act as well as the National Health Act to some extent, the rights and responsibilities granted to the various parties involved. It will thereafter proceed by looking at how the same can be used to fill the gap in Kenya's regulatory framework.

In a report by the South Africa Law Commission, a recommendation for surrogacy to be legalized and provided for was made. This was because of its risky nature as well as the constant medical and legal procedures it requires.¹²¹ Surrogacy is provided for mainly by the Children's Act of South Africa, the logic behind this being that it was alleged to revolve around matters concerning the child.¹²²

3.2 The surrogate agreement

Over and above everything, South Africa has exclusively prohibited commercial surrogacy.¹²³ It is the duty of the court to investigate and determine that the agreement has no financial gain.¹²⁴ However, compensation in terms of money for loss of earning as a result of pregnancy or insurance for the duration of the pregnancy as well as any other expenses related to the agreement may be allowed.¹²⁵ To begin with, the High Courts and the Divorce Courts have been granted jurisdiction over matters pertaining issues on surrogate motherhood, this is pending the establishment of a family court by the parliament.¹²⁶ The agreement has to be in writing and signed by the parties involved, and thereafter confirmed by the High Court for it to be valid.¹²⁷ In addition, at least one of the applicant parents as well as the surrogate mother and her partner or husband should reside in the country at the time of entering the contract.¹²⁸ This

¹²¹ The South African Law Commission, 'South African Law Commission Report on Motherhood', Pretoria, 1992.

¹²² Sloth-Nielsen J, 'Surrogacy, South African Style' University of the Western Cape, CapeTown, 2013.

¹²³ Section 301, *Children's Act of South Africa* (Act No. 38 of 2005).

¹²⁴ Nicholson C & Bauling A, 'Surrogate motherhood agreements and their confirmation: A new challenge for practitioner?' 46 *De Jure Law Journal* 2, 2013, 13.

¹²⁵ Section 301, *Children's Act of South Africa* (Act No. 38 of 2005).

¹²⁶ Section 45(3), *Children's Act of South Africa* (Act No. 38 of 2005).

¹²⁷ Section 292, *Children's Act of South Africa* (Act No. 38 of 2005).

¹²⁸ Section 292, *Children's Act of South Africa* (Act No. 38 of 2005).

controls tourists from going to the country just for the purposes of surrogacy and departing after a short time.¹²⁹

Consent from both parties, that is the applicant parents as well as the surrogate mother with her partner or husband is necessary for the agreement to be confirmed.¹³⁰ Moreover, another condition set for the agreement to be approved is that the gametes used should come from at least one of the applicant parents.¹³¹ Most importantly, the agreement should include provisions on the care and upbringing of the child being sought, as well as his or her position in the event the applicant parents are deceased or divorced. These provisions should be provided with the best interest of the child in mind.¹³²

3.3 The child

To begin with, the Act provides that every child borne out of this agreement has the right to have access to any information concerning the genetic parents, but this only applies after they have reached the age of majority, which is 18 years old.¹³³ This information should similarly be given after counselling of the person requesting the information.¹³⁴ The best interest of the child as well concerning all decisions made has been upheld as this has to be guaranteed in the agreement before it is confirmed by the courts.¹³⁵

3.4 The applicant parents

In order for one to qualify as an applicant parent, they should not be able to have a child, and this condition should be permanent and non-reversible.¹³⁶ The South African legislation on surrogacy has a provision on parental orders.¹³⁷ As part of the rights of children, the Children's Act provides that children; who are conceived by artificial fertilization to spouses, this being the applicant parents, with the consent of both spouses; shall be considered as children of the applicant parents.¹³⁸ This eases the process completely as opposed to Kenya, they do not have to start another process of adopting the children thereafter.

¹²⁹ Sloth-Nielsen J, 'Surrogacy, South African Style' University of the Western Cape, CapeTown, 2013.

¹³⁰ Section 293, *Children's Act of South Africa* (Act No. 38 of 2005).

¹³¹ Section 294, *Children's Act of South Africa* (Act No. 38 of 2005).

¹³² Section 295(d), *Children's Act of South Africa* (Act No. 38 of 2005).

¹³³ Section 41(1)(b), *Children's Act of South Africa* (Act No. 38 of 2005).

¹³⁴ Section 41(3), *Children's Act of South Africa* (Act No. 38 of 2005).

¹³⁵ Section 295, *Children's Act of South Africa* (Act No. 38 of 2005).

¹³⁶ Section 295 (a), *Children's Act of South Africa* (Act No. 38 of 2005).

¹³⁷ Section 40, *Children's Act of South Africa* (Act No. 38 of 2005).

¹³⁸ Section 40(1), *Children's Act of South Africa* (Act No. 38 of 2005).

3.5 The surrogate

The surrogate mother or her partner and relatives, have no right over the child born in terms of parenthood and care. Similarly, they should not have any contact with the child unless the agreement allows for it, and should hand over the child as soon as reasonably possible.¹³⁹ On one hand, this could be seen to be greatly inhumane, with the consideration of the law expecting the surrogate mother to carry a child for nine-months and have no contact at all. However, on the other hand this is largely beneficial to the contract seeing that this will prevent the surrogate from making decisions that will end up frustrating the contract.¹⁴⁰ In order for the surrogate mother to qualify as a surrogate mother, the court needs to be convinced that she is in a good emotional state and as well understands the impact the child being taken from her might have on her life. A psychological assessment is usually done by an experience psychologist.¹⁴¹ She is seemingly required to have born a child of her own and the child should be living.¹⁴²

3.6 Termination of the contract

It is important to note that the artificial fertilization of the surrogate mother cannot take place after eighteen-months lapse from the date the agreement has been confirmed. This is the first way in which this agreement can be terminated.¹⁴³ On the same note, after the artificial fertilization of the surrogate mother has taken place, the agreement can in no way be terminated.¹⁴⁴ The contract may also be terminated by the surrogate mother; who is also the genetic mother of the child; giving a written notice to the courts before a lapse of sixty-days after the child is born.¹⁴⁵ The termination of the pregnancy automatically results to the termination of the contract.¹⁴⁶ However, a termination of the contract does not necessitate the termination of pregnancy. Should the contract be terminated, then the surrogate mother automatically obtains the parenthood rights, where she has a partner or husband, they too obtain parenthood rights. However, in the case the applicant father is the biological father, or should the surrogate not have a partner husband, then in these two instances the father is obligated to accept the rights of parenthood.¹⁴⁷

¹³⁹ Section 297, *Children's Act of South Africa* (Act No. 38 of 2005).

¹⁴⁰ Sloth-Nielsen J, 'Surrogacy, South African Style' University of the Western Cape, CapeTown, 2013.

¹⁴¹ Section 7, *the National Health Act of South Africa* (2003).

¹⁴² Section 295, *Children's Act of South Africa* (Act No. 38 of 2005).

¹⁴³ Section 296(1), *Children's Act of South Africa* (Act No. 38 of 2005).

¹⁴⁴ Section 297(1)(e), *Children's Act of South Africa* (Act No. 38 of 2005).

¹⁴⁵ Section 298, *Children's Act of South Africa* (Act No. 38 of 2005).

¹⁴⁶ Section 300, *Children's Act of South Africa* (Act No. 38 of 2005).

¹⁴⁷ Section 299, *Children's Act of South Africa* (Act No. 38 of 2005).

3.7 Judiciary approach to surrogacy

With respect to the judiciary approach to surrogacy, we shall take keen notice of one of the prime cases decided after the date of commencement of the Children's Act of South Africa.¹⁴⁸ The case referred to which as well brought about an advancement to the practice of surrogacy is *Ex Parte WH & others*.¹⁴⁹ The Bar, the Law Society, and the Centre for Child Law received an invitation from the Deputy Judge President to make submissions as *amicus curiae* to the court regarding some pertinent issues surrounding surrogacy in South Africa that were either brought up by the Children's Act, while others were already present but not addressed. This includes the approach to be followed in a case where the genetic material that was used was not of either of the applicant parents; the approach to be followed when homosexuals apply for surrogacy and lastly what factors should be considered and steps to be followed to determine the best interest of the child. This was after a gay married couple approached the court seeking orders of surrogacy after being introduced to a potential surrogate mother. The surrogate mother was engaged, and had two children but from the previous marriage; but the gametes being used were neither hers nor of the married gay couple.¹⁵⁰

With regards to homosexuals seeking surrogacy, the court noted that the law which provides for the right against discrimination is inclusive of the right to not be discriminated on a sexual orientation basis. The right to seek artificial reproduction should therefore be availed to all regardless of their sexual orientation. They as well stressed the connotation that a mother's influence and care that a child may need is not attached to any gender.

With regards to the best interest of the child, they thought it worthy to note that the Act has not given an exhaustive list governing the same, but it should be flexible as different cases differ. As the Act stresses that the court has the power to terminate the surrogacy confirmation order after any finding and issue an appropriate order with regards to the best interest of the child.

Ultimately, with regards to the procedure to be followed within the surrogacy agreement, the court stated further criteria to be met before any surrogacy agreement could be confirmed. That includes proposals relating to the involvement of agencies that linked the applicant parents with the surrogate mother; as well as an affidavit by the agency stating their particulars, how they obtained the surrogate, whether they have been paid or what exactly their business is in the

¹⁴⁸ Noting that the Children's Act of South Africa commenced on 1 April 2010.

¹⁴⁹ *Ex Parte WH & others* (2011) High Court of South Africa.

¹⁵⁰ *Ex Parte WH & others* (2011) High Court of South Africa.

process. The affidavit should also include whether or not the applicant parents know the surrogate, in the event that they know her, their relationship should be described. On part of the surrogate mother, information on her background and relationship she may be involved in should be provided as well as her financial status and why she opted to be a surrogate mother for the couple. This is to try and minimize cases where the underprivileged are forced into being surrogate mothers due to their financial status while they try to make ends meet.

Moreover, the court required that all details concerning any payment whatsoever and any compensation given to all parties involved; this includes the donor of the gametes, the clinic, or the surrogate; should be revealed to them.

3.8 Application to Kenya's regulatory framework

Kenya could definitely obtain a few takeaways from the South African legislation on surrogacy. The first of them being to actually have a legislation on surrogacy and not just other laws that do not speak to surrogacy itself but could affect it. The cases discussed above on the judicial approach to surrogacy in Kenya as well portrayed the great need for a framework to govern the practice of surrogacy.

The current bill, could nonetheless be said to have already answered most of the pertinent issues just like the Children's Act of South Africa and the caselaw discussed above does; for example who obtains legal parenthood?¹⁵¹ Should the surrogate be paid?¹⁵² What determines whether or not a couple qualifies to contract into a surrogacy agreement?¹⁵³ What is the determining factor as to who qualifies to be a surrogate?¹⁵⁴ Should the consent of the donors be given prior to their usage?¹⁵⁵ And Most importantly, what makes a surrogacy agreement valid?¹⁵⁶ These questions as to how to maneuver through surrogacy have been answered by the bill, and in a similar manner as compared to South Africa's legislation. However, Kenya still discriminates against sexual orientation as the artificial reproduction is not open to homosexuals. The law is derived from the ethics, thereby justifying this stand. Therefore, the call to allow this process for the homosexuals is a whole different discussion.

¹⁵¹ Section 19, *the Reproductive Healthcare Bill* (2019).

¹⁵² Section 22, *the Reproductive Healthcare Bill* (2019).

¹⁵³ Section 14(1)(b), *the Reproductive Healthcare Bill* (2019).

¹⁵⁴ Section 14(1)(c), *the Reproductive Healthcare Bill* (2019).

¹⁵⁵ Section 11 (1)(a), *the Reproductive Healthcare Bill* (2019).

¹⁵⁶ Section 15, *the Reproductive Healthcare Bill* (2019).

3.9 Conclusion

The law in South Africa most definitely is not flawless. From the applicant parents being required to have a genetic relationship with the child is rather discriminatory especially for couples who are both infertile as this exempt them from taking part in a surrogacy agreement. The terms within which the surrogate mother lets go of the child she bears is also unfair in my opinion. However, most questions on the Kenyan system could easily be answered by an application of South Africa's surrogacy regulatory framework. It may not be perfect, but it is a good place to start, and it could always be improved.

CHAPTER IV: THE SIGNIFICANCE AND PROPOSAL OF A REGULATORY FRAMEWORK FOR ARTIFICIAL REPRODUCTION

4.1 Introduction

This far, the study has established the understanding of how surrogacy takes place in Kenya as well as a comparison of the regulations between South Africa and Kenya, we are more equipped to give recommendations as to the legislative framework. This chapter seeks to first look at the significance of a regulatory framework with this respect to surrogacy then proceed to give recommendations and conclude the study with a summary of its findings.

4.2 The significance of a surrogacy regulatory framework

As a common function of regulation, we know regulation as a means to protect and help with the proper function of the society. That being said, the significance of a surrogacy can easily be obtained from an analysis of the current practice as it stands. This study will attempt to bring out the significance of regulations by similarly looking at how it stands to affect all parties concerned with surrogacy.

One of the theories discussed herein is that of utilitarianism. On that note therefore, that which should be socially acceptable is that which brings about the highest amount of happiness to the highest number of people. Therefore, from a utilitarian perspective, surrogacy would be a socially acceptable act. Donum Vitae however provides a contradictory opinion to that of a utilitarian. That is, if the procedure replaces a conjugal act, then the process is immoral.¹⁵⁷ This shows that there is clearly a push and pull as to whether or surrogacy should be allowed in the society. With different communities having different views, regulations would help to uphold their culture. For instance, with how Kenya openly does not support homosexual relationships, the various regulations in place help to uphold this culture, such as the constitution and its stand on allowing marriage of individuals opposite sex.¹⁵⁸

Regulations would as well help to keep the clinics in line with respect to how they carry out the process, and the level of healthcare they give to the donors of gametes, the surrogate, and the child. More so on the pricing of the process. Being able to contract in a surrogacy agreement should be a process that is open to all. High pricing discriminates against those who will not be able to afford.

¹⁵⁷ 'Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day', Donum Vitae [11, B, 6]

¹⁵⁸ Article 45(2), *Constitution of Kenya* (2010).

It is also very important to ensure that the surrogates are cared for. This is because being the carrier of the child they are open to several pregnancy conditions which are uncomfortable as well as inhibits their ability to carry out their day-to-day activities, for instance, they have to take leave off work at some point, which subsequently means less income; for the married, some are restricted from enjoying their conjugal rights. Similarly, in a case of commercial surrogacy, those that have the money have control full control of the process; more often than not the surrogate is normally of a lower class as compared to the applicant parents. The desperation caused by lack of employment could push people into being surrogates.

Moreover, regulation ensures a stable practice. This will make surrogacy less scandalous. It mitigates corruption while trying to find a faster way through adoption processes. The sanctions from regulation levels the playing field to ensure that there are no illegal players, and that everyone has an equal opportunity. The regulations could also clearly stipulate who the child would belong to, and to provide clear solutions in terms of ensuring the transmission of the child's custody.

Be that as it may, there still stands blanks that regulation cannot fill. First and foremost, surrogacy happens to a form of agreement. However, it cannot fit in the realm of contract law seeing as it entails human life; this would rather be objectifying human beings. This leaves a dilemma. Secondly, the identity of the child will forever be violated. Without doubt, there will always be a trace of the surrogate mother in the child, even though the relationship is cut immediately at birth.

RECOMMENDATIONS

Drawing lessons from the South African legislation on surrogacy as well as its judicial approach discussed above, this study makes the following recommendations to be considered when establishing law to govern surrogacy.

a) The surrogacy agreement

The surrogacy agreement should be written; entailing everyone's role in the agreement and their rights; and signed, with a witness present. This ensures that all parties involved are fully aware of their rights and responsibilities and that the agreement is consensual. It should as well provide for the compensation that should be expected, completely shunning the practice of commercial surrogacy.

With regards to termination, it should not be provided for that the surrogacy agreement cannot be terminated after artificial fertilization has taken place. The surrogate should as well be given the freedom to terminate the agreement after the same should she be the genetic mother of the child. Where breach or termination has occurred, the remedies availed to them should clearly be stated in the agreement. Seeing that the agreement is not commercial in nature, then only consideration given in light of ensuring the pregnancy is comfortable should be given back.

b) The surrogate

It is imperative that a surrogate contract into a surrogacy agreement with informed consent without any coercion whatsoever. Secondly, there should be a psychological examination done on the surrogate to make sure that the surrogate is of sound mind and understands what it means to be a surrogate as well as the impact it may have on her. Seeing that there would be a psychological exam then the surrogate should be of the age of majority that is 18 years old as per the Kenya Constitution.¹⁵⁹ Though it may seem young, the psychological exam would be able to ensure that they are mature enough to contract into such an involving agreement.

It is also important to ensure that the surrogate mother has children of her own. The thought of carrying a child for nine months then going home empty-handed nursing post-partum conditions such as leaking breastmilk could result to severe emotional damage. Some may want to keep the child after seeing him or her. Having a child would not necessarily assure them of not going through that, but it would at least make the detachment easier since they have one of their own.

c) The applicant parents

Just like the surrogate, the applicant parents should be of age and mentally prepared and capable of having a child. That being said, this necessitates for a need for them to have a psychological test done on them as well to ensure the same. The resources they have should not be a factor on who gets to be a commissioning parent and who does not. Similar to how when it comes to natural birth there are no restrictions as to who can give birth or not, the right to have a family is equally granted to all, therefore the same should be provided for surrogacy agreements as well.

Seeing that we are trying to not make the process be about renting and buying children, then it is only fair for the process to be limited to only those who are incapable of having children of

¹⁵⁹ Article 260, *Constitution of Kenya* (2010).

their own. There are instances of women refusing to bear children of their own and resulting to surrogacy just because they want to maintain their body physique or wanting to continue to advance their careers. Moreover, the applicant parents should be given legal parenthood rights, which entails their names being listed as the legal parents of the child.

d) The donor of gametes

There needs to be adequate healthcare guaranteed to the donors of sexual gametes. This is because there are several instances of women donating their gametes, and the medical procedure harming their ability to have their own children. They too need to be assured of a high standard of care, and the medical practitioners need to give them priority as well. These donations too should not have any consideration whatsoever. Just like there is no business for renting wombs and buying babies, then sexual gametes should refrain from being bought. Especially in Kenya, there are several young females who get severe medical conditions after offering their ova for pay.

On the side of the male donors, the clinics need to find a way of obtaining the male sex gametes other than masturbation. Seeing that masturbation is immoral, even though in this case it results to some good deed, it should still not be advocated for.

e) The donated sexual gametes

On the subject of donated sexual gametes, the legislation should provide for a way of storing and disposing them.

f) The child

With respect to the child, there needs to be a provision in place that gives them the freedom to seek their genetic parents, more so where genetic diseases come to play. The best interest of the child should be considered, as well as their position in case of deceased parents.

The last recommendation, but certainly the greatest is that the Reproductive Healthcare Bill should be passed into a law so that it could finally come to play. We, as a country, are worse off seeing that we have no regulations in place. The self-regulatory surrogacy process should come to a halt.

CONCLUSIONS AND FINDINGS

This study started off with three objectives in mind, for purposes of reiteration, these were;

- ❖ Analyzing the current practice of surrogacy in Kenya.
- ❖ Identifying what rights and responsibilities should be accorded to the parties involved in the contracts of surrogacy and IVF and the remedies that can be accrued to them should there be a breach of contract.
- ❖ To propose a legislative framework which can be applied to regulate the assisted reproduction in Kenya.

An introduction of the study explaining what surrogacy and IVF is as well as what it entails was given. The study then gave a theoretical framework on which it would be based on. Thereafter, it highlighted how surrogacy is practiced in Kenya, as well as the various regulations in place that help mold the process. The judiciary approach to the practice of surrogacy portrayed the need of a regulatory framework. With this, the study achieved its first objective.

It then moved forward to looking into how surrogacy is practiced in South Africa. South Africa was chosen because it is easier to relate to being an African country, its advancement in other areas as well, make it a country to look up to. Similarly, Kenya has borrowed from South Africa with other laws like the Marriage Act which also entails the family and children, therefore, drawing lessons on its practice of surrogacy would equally be fitting. A comparison with this state led the study to achieve its second objective of finding out the right and responsibilities to be accorded to the various parties involved as well as the manner to work towards giving remedy to the parties where the contract is breached or terminated.

The study thereafter concluded with highlighting the various significance of a regulatory framework giving recommendations on what should be considered when coming up with a legal framework, achieving its final objective. We cannot deny the advancement Kenya has made with respect to surrogacy; from having no law, to the improvements and moderations brought about to achieve the Reproductive Healthcare Bill. Nonetheless, the fact that it is yet to be passed into a law makes it of no use. The regulation definitely long overdue and having one should be a priority should the country wish to pursue the practice of surrogacy and IVF.

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