



Strathmore University

Law School

1.

**POLYGAMY AND THE BEST INTERESTS OF THE CHILD: AN ANALYSIS OF
THE LAW IN KENYA**

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By

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Declaration

I, **KOECH FAITH JERONO**, 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..... *F Koech*

Date..... 4/4/25

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

Signed..... *JG*

Date..... 4th April 2025

Abstract

Polygamy, a deeply rooted cultural practice in Kenya, presents significant challenges in ensuring fairness and justice for all parties involved, particularly children. This study examines the impact of polygamy on children and examines the adequacy of the Kenyan legal framework in safeguarding their best interests. Anchored in the best interest principle outlined in the United Nations Convention on the Rights of the Child (UNCRC), the study evaluates Kenya's Children Act (2022) to determine its adequacy in addressing the unique challenges faced by children in polygamous customary unions.

Applying a doctrinal research methodology, the study draws insights from existing literature on the impacts of polygamy on children. Findings reveal significant emotional, psychological, social, and financial neglect experienced by children in these unions, often stemming from a lack of equitable resource distribution and emotional support from fathers. Additionally, the study identifies a critical gap in Kenyan law where existing provisions inadequately address the specific needs of children in polygamous customary settings application of the best interest principle.

The study concludes by proposing targeted legal reforms to enhance the protection of children's rights in polygamous unions.

Key words: Polygamy, Children Act 2022, Best Interest Principle, Child's rights.

List of Abbreviations

ACRWC - African Charter on the Rights and Welfare of the Child

CEDAW - Convention on the Elimination of All Forms of Discrimination Against Women

IPA - Interpretative Phenomenological Analysis

UNCRC - United Nations Convention on the Rights of the Child 1989

List of Cases

1. *MWK v. Attorney General*, 2017
2. *The Institute for Human Rights and Development in Africa and Open Society Justice Initiative v. Kenya*, 2011

List of legal instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990
2. Children Act No. 29 of 2022
3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979
4. Constitution of Kenya, 2010
5. European Convention on the Exercise of Children's Rights, 1996
6. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993
7. Judicature Act No. 8 of 1968
8. Marriage Act No. 4 of 2014
9. United Nations Convention on the Rights of Persons with Disabilities, 2006
10. United Nations Convention on the Rights of the Child (UNCRC), 1989

CHAPTER ONE: INTRODUCTION

1.1 Background

Polygamy has deep cultural and religious roots in many African societies, including Kenya, where it has historically been a social norm among various communities. Polygamy was associated with economic and social prestige. A majority of African indigenous communities believe that a man having male children enhances a man's position and prominence in society. His name in addition remains immortalized. Therefore, if the first wife bears only female children, the husband may choose to get another wife so as to get sons leading to polygamy.¹ Despite its cultural prevalence, the practice of polygamy poses significant challenges in the context of modern legal systems, especially concerning the rights and interests of children born into such unions.

In Kenya, the legal landscape recognizes polygamy as a valid form of marriage. The Marriage Act, No. 4 of 2014, acknowledges both monogamous and polygamous unions and provides for their formalization under section 6(3) which states that a marriage that is celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.² While the Marriage Act seeks to provide legal certainty for polygamous marriages, it does not comprehensively address the unique challenges faced by children in polygamous families, leaving a gap in the protection of their rights. This shortfall becomes particularly significant when considered through the lens of Section 8 of the Children Act, 2022. This section states that in all actions concerning children, carried out by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child must be the primary consideration and encompass, but are not be limited to, the factors outlined in the First Schedule.

Additionally, the Constitution of Kenya 2010 reinforces the centrality of children's rights in the following provisions: Article 53(2) which states that a child's best interests are of paramount

¹ Lawrence G, 'The socio-cultural significance of polygamy in Africa' 5 *International Journal of Social Sciences and Humanities* 1, 2019, 1.

² Section 6 (3), *Marriage Act* (Act No.4 of 2014)

importance in every matter concerning the child³, Article 53(1) (e) states that every child has the right to parental care and protection, which includes equal responsibility from both parents, whether married to each other or not⁴ and article 53(1) (d) guarantees every child the right to protection from abuse, neglect, and all forms of exploitation.⁵ Regardless of these robust legal provisions children in polygamous families often face emotional and financial neglect. However, the practical application of this principle in Kenya, particularly in polygamous settings, remains inconsistent and underexplored. Studies indicate that children in polygamous unions often face stigma, psychological distress, and unequal treatment.

Internationally, the principle of the child's best interests is established under Article 3 of the United Nations Convention on the Rights of the Child (UNCRC), which Kenya ratified in 1990.⁶ This principle, under Article 3, obligates state parties to ensure that all legislative, administrative, and judicial measures prioritize the child's welfare. However, the practical application of the best interest principle in Kenya, particularly in polygamous settings, remains understudied. There is a gap in the analysis of the adequacy of Kenyan law to address the unique challenges faced by children in such unions through the lens of the best interest principle. This study seeks to fill this gap by assessing the extent to which Kenyan legal provisions align with this principle and by proposing reforms to enhance the protection of children's rights in polygamous customary families.

1.2 Statement of problem

Polygamy is a legally recognized practice in Kenya under the Marriage Act 2014, yet its impact on the well-being and rights of children born into such unions remains inadequately recognized specifically within the Children Act 2022 which provides for measures designed to protect and uphold the rights of children. Despite the constitutional and statutory obligations to prioritize the best interests of the child, the existing Kenyan legal framework fails to address the unique challenges faced by children in polygamous families. These children frequently experience emotional neglect, unequal treatment, and strained family dynamics, which undermine their

³ Article 53 (2), *Constitution of Kenya*, (2010).

⁴ Article 53, *Constitution of Kenya*, (2010).

⁵ Article 53 (1) (d), *Constitution of Kenya* (2010).

⁶ Zaman M, Chatterjee S. 'Child rights in Kenya - 30 years on' UNICEF Kenya, 2019, 1.

inherent dignity and development. Moreover, the absence of targeted legal mechanisms leaves a critical legal gap in safeguarding the best interests of children in polygamous unions. This study seeks to address these issues by analyzing the adequacy of Kenyan law in protecting the best interests of children in polygamous unions and proposing reforms to bridge these gaps.

1.3 Purpose of the study

The purpose of this study is to examine the inadequacies in Kenyan law regarding the protection of children's best interests within polygamous unions. Given that polygamy has been shown to have significant psychological, emotional, physical, and academic performance effects on children, there is a critical need to assess whether current legal frameworks sufficiently safeguard these vulnerable individuals. The study aims to identify gaps in the law that may leave children in polygamous families exposed to various harms and to recommend potential legal remedies that could better align with the principle of prioritizing the best interests of the child. The ultimate goal is to advocate for legal reforms that ensure children's rights to shelter, education, and a nurturing environment are upheld, irrespective of their family structure. By doing so, the study intends to offer legal solutions that protect children from the adverse effects of polygamy while promoting their overall well-being and development.

1.4 Research Objectives

1. To examine the best interest principle of a child, its rationale and its application internationally and in Kenya.
2. To explore how polygamy impacts a child's best interests.
3. To analyze the Children Act 2022 and its adequacy to protect the best interests of the child in polygamous unions in Kenya.
4. To propose possible reforms to the law in order to enhance the protection of children's best interests especially in polygamous customary marriages.

1.5 Research Questions

Overarching research Question: Does Kenyan Law adequately protect the best interest of children in polygamous families?

1. What is the best interest principle of a child, what is its rationale? And how is it applied?
2. How does polygamy impact the best interests of a child?
3. Does the Children Act adequately provide for the protection of the best interests of children in polygamous unions?
4. What legal reforms can be implemented to better protect the best interests of children in polygamous customary marriages in Kenya?

1.6 Justification of the study

This study is justified by the need to address a critical gap in the understanding of how polygamy impacts the best interests of children, particularly within the Kenyan legal framework. While existing literature broadly examines the effects of polygamy on children, it often lacks a focused analysis through the lens of the best interest principle. Additionally, the unique needs of children in polygamous families are inadequately addressed in Kenyan law, despite the prevalence of polygamy in the country. By analyzing the adequacy of existing legal provisions and proposing reforms, this research seeks to contribute to the development of child-centred policies and laws that ensure equitable protection of the best interests of children in polygamous unions.

1.7 Scope of the study

The scope of this study focuses on the interplay between polygamy and the best interest of children within the context of Kenyan law. It delves into the legislative framework governing children's rights, specifically the Children Act 2022, to evaluate their provisions in addressing the unique challenges faced by children in polygamous unions. By examining the application of the best interest principle in the Kenyan legal framework, the study explores how polygamy impacts children psychologically, spiritually, emotionally, socially and economically, and whether existing laws sufficiently protect their rights.

Furthermore, the study is limited to Kenyan jurisdiction, providing an assessment of the law's adequacy in safeguarding the best interests of children in polygamous customary families. While referencing international conventions like the UNCRC, the research narrows its lens to Kenya's legal obligations and practices. This focused approach ensures a comprehensive understanding of

polygamy's legislative and practical implications for children's welfare, setting the stage for potential legal reforms to enhance the protection of their rights.

1.8 Hypothesis

Polygamy has a negative impact on the best interests of children due to unequal allocation of parental attention, emotional neglect and social and economic disparities within polygamous families. The Kenyan legal framework, while acknowledging the best interest principle under the Children Act 2022 and the Constitution 2010, inadequately addresses the unique needs of children in polygamous unions. Strengthening and reforming Kenya's laws to account for the specific challenges faced by such children will enhance their protection and ensure the equitable realization of their rights. This study posits that addressing these gaps is essential for upholding the best interests of children in polygamous customary marriages.

1.9 Theoretical framework

1.9.1 Best Interests Theory

The Best Interest Theory is based on the best interest principle founded in the United Nations Convention on the Rights of Children 1989. The Best Interest Principle, under Article 3 of the Convention on the Rights of Children is one of the four foundational principles within the Convention.⁷ Article 3 of the Convention on the Rights of Children states that in all actions relating to children, whether done by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the primary consideration shall be the best interest of children.⁸

Before discussing the theory, it is important to define a child to be every human being who is below the age of eighteen years, unless under the law applicable to the child, the age of majority is attained earlier, as according to Article 1 of the Convention on the Rights of the Child.⁹ Article 3 can only be fully understood by studying its precise formulation. It refers to executive

⁷ George M, Noor M, 'The best interest principle within article 3 (1) of the United Nations Convention on the Rights Of The Child' 19 *International Journal of Business, Economics and Law* 4, 2019, 31.

⁸ Article 3, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

⁹ Article 1, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

authorities, law-makers (parliaments) and judicial bodies. It applies to all actions by these authorities as well as by relevant private institutions. Additionally, it also concerns ‘children’ in the plural. The Committee on the Rights of the Child has interpreted this wording to mean that the article is applicable in both individual cases and in relation to groups of children or children in general – which makes it even more relevant in political and policy terms.¹⁰

Other articles of the UNCRC that utilise the phrase ‘best interests’ include: Article 9 which states that in a case where a child needs to be separated from his or her family due to reasons such as neglect or abuse, decisions should prioritize what is best for the child in terms of safety and well-being. Article 18 emphasizes that parents hold the primary responsibility for raising their children, with their best interests as their guiding factor in parental decision-making. Article 20 addresses foster care and alternative family arrangements, ensuring that placements are made in environments that best support the child’s developmental needs. Additionally, article 21 extends this principle to adoption, requiring that any adoption process prioritize the child’s welfare above every other consideration. Finally, article 40 focuses on juvenile justice, requiring that children who break the law are treated in a way that prioritizes their best interests, aiming to rehabilitate and reintroduce them into society rather than simply punish them.¹¹

The Best Interest Principle implies that a child's welfare should be the most important factor when making any decisions that affect them. This principle requires that the decision-maker, be it the parents, caregiver, legal authorities or institutions, prioritize what will best promote the child’s safety, health, happiness and long-term development. Therefore, when making a decision relating to a child, the primary consideration should be the overall well-being of the child: physical, emotional, social and spiritual above all else. It can be derived from the articles of the UNCRC that it would be in the best interests of a child to: receive education (Article 28), know and be cared for by his or her parents (Article 7), have family relations (Article 8), be heard in matters concerning him or her (Article 12), and to be respected and seen as a person (Article 16). It is to be noted that there is no criteria or list of what constitutes the best interests of a child

¹⁰ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 2

¹¹ Council of Europe, *The principle of the best Interests of the child – What it means and what it demands from adults*, 2008, 2.

within the Convention, the rights contained in the UNCRC are what can be derived but not exhaustive and final.¹²

The Best Interests Theory will be crucial in evaluating the Kenyan Children Act 2022 to determine whether the law adequately protects and serves the welfare of children born in polygamous unions. By using this theory as a guide, the study will systematically assess if the provisions within these laws prioritize and safeguard the unique needs of children from polygamous unions. In particular, the Best Interests Theory will serve as a lens to examine whether the Children Act 2022 effectively addresses financial support, custody, and general welfare in ways that account for the complexities of polygamous unions, where multiple households and family members may have overlapping responsibilities.

This theory is relevant to the study because it provides a benchmark against which to measure the Kenyan legal framework's effectiveness in protecting children's welfare. It also highlights areas where laws may fall short in addressing the unique challenges of polygamous family dynamics. By grounding the research in the Best Interests Theory, the study aims to identify potential legal gaps and recommend reforms that better serve the rights and welfare of children in polygamous unions.

1.10 Literature Review

Roxana Ionescu provides a comprehensive analysis of the best interests principle within family law, emphasizing that it aims to prioritize a child's physical, psychological, and moral development, as well as their stability and well-being.¹³ She critiques its abstract application by courts, as well as automatism which can fail to address the specific needs of individual children.¹⁴ The author argues that courts should prioritize the child's physical, moral, and intellectual development, ensuring that decisions focus on the child's well-being rather than the

¹² Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 5.

¹³ Roxana Ionescu, 'The best Interests of the child' *Annals of "Dunarea de Jos" 4 University of Galati: Legal Sciences* 26, 2021, 80.

¹⁴ Roxana Ionescu, 'The best interests of the child' *Annals of "Dunarea de Jos" 4 University of Galati: Legal Sciences* 26, 2021, 83.

parents' desires.¹⁵ She advocates for a more thorough and context-sensitive application of the principle to protect children from parental conflict, alienation, and neglect, ensuring their long-term welfare.

On the other hand, Mary George and Noor Aziah in their article on the best interests principle highlight the principle's role as a core yet contested concept under Article 3(1) of the UNCRC. The authors argue that the principle serves as a substantive right, an interpretative legal principle, and a procedural rule applied broadly in matters affecting children.¹⁶ The authors point out that the principle is often criticised for being vague, indeterminate and having different interpretations, leading to inconsistent application across jurisdictions.¹⁷ They argue that while the UNCRC does not provide a definitive checklist for assessing best interests, it implicitly suggests criteria such as the child's views, the importance of the child's identity and the preservation of family relations, upholding the care, protection and safety of the child.¹⁸ The authors advocate for the formulation of check-lists within domestic law of State Parties to reduce the principle's indeterminacy and subjectivity, noting that the rights enshrined in the UNCRC form a structural framework to guide decision-making.¹⁹ They conclude that any interpretation conflicting with a child's rights under the UNCRC cannot be considered in their best interests.

David Otieno Ngira took a different approach by examining the best interests of the child principle within the plural legal system in rural Kenya, particularly among the Kipsigis community. The author highlights how customary and municipal laws often clash in determining the child's best interests. While statutory law views children's rights as individual and universal, Kipsigis customary law views children's best interests as intertwined with family and community well-being, emphasizing duties and obligations within these relationships.²⁰ Ngira points out that the Kipsigis approach to children's rights focuses on long-term interests, such as guaranteeing

¹⁵ Roxana Ionescu, 'The best interests of the child' *Annals of "Dunarea de Jos" 4 University of Galati: Legal Sciences* 26, 2021, 81.

¹⁶ Awal N and George M, 'The best interest principle within Article 3(1) of the United Nations Convention on the Rights of the Child' 19 *International Journal of Business, Economics and Law* 4, 2019, 31.

¹⁷ Awal N and George M, 'The best interest principle within Article 3(1) of the United Nations Convention on the Rights of the Child' 19 *International Journal of Business, Economics and Law* 4, 2019, 30.

¹⁸ Awal N and George M, 'The best interest principle within Article 3(1) of the United Nations Convention on the Rights of the Child' 19 *International Journal of Business, Economics and Law* 4, 2019, 32.

¹⁹ Awal N and George M, 'The best interest principle within Article 3(1) of the United Nations Convention on the Rights of the Child' 19 *International Journal of Business, Economics and Law* 4, 2019, 34.

²⁰ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 555.

inheritance while parents are still alive²¹ and strengthening the child's connection with clan or family members, who play a crucial role as a social insurance system in situations where parents are deceased.²² He highlights that some customary practices, such as child marriage²³ and corporal punishment,²⁴ however, conflict with international human rights standards. The article ultimately argues that child protection actors should embrace those aspects of customary law that promote children's best interests.

Yasuko Hayase and Kao-Lee's article on factors of polygamy in Sub-Saharan Africa explores polygamy's historical, cultural, and socio-economic dimensions in various regions across the continent. It highlights that polygamy, particularly polygyny, has long been a deeply ingrained value system and a socially acceptable marital practice in Sub-Saharan Africa,²⁵ with its prevalence varying across regions. The study finds that the practice is driven by economic and cultural factors, such as the demand for female labour in agricultural societies, the importance of lineage continuity, and the status associated with large families.²⁶

Polygamy has been found to have negative effects on the family structure, especially the children and the wives. A study done on the effects of polygamous marriages on familial life examined how polygamous marriages, specifically polygyny, affect family relationships in Bajaur, Pakistan.²⁷ It finds that polygamy is widely practiced in the region and often leads to significant familial issues such as heightened conflict, jealousy, emotional stress, and limited decision-making power for the women.²⁸ Co-wives frequently experience rivalry and competition, especially over household resources and the husband's attention, creating tension and insecurity. The study also shows that husbands rarely treat their wives equally, often

²¹ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 560.

²² Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 555.

²³ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 558.

²⁴ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 560.

²⁵ Hayase Y, Liaw K, 'Factors on polygamy in Sub-Saharan Africa: Findings based on the demographic and health surveys' 35 *The Developing Economies* 3, 1997, 294.

²⁶ Hayase Y, Liaw K, 'Factors on polygamy in Sub-Saharan Africa: Findings based on the demographic and health surveys' 35 *The Developing Economies* 3, 1997, 293.

²⁷ Amin F, Ali A, Ahmad S, Dr. Shakoor A, Dr. Sajjad A, Umer Z, 'Effects of polygamous marriages on familial life' 18 *Webology* 6, 2021, 8292.

²⁸ Amin F, Ali A, Ahmad S, Dr. Shakoor A, Dr. Sajjad A, Umer Z, 'Effects of polygamous marriages on familial Life' 18, *Webology* 6, 2021, 8301.

favouring one over the others, resulting in feelings of jealousy and hatred towards the most favoured wife.²⁹ It concludes that enforcing marital rights and strengthening the implementation of existing legal frameworks, such as the Muslim Family Law Ordinance, are essential to reducing the negative impacts of polygamous marriages and promoting more equitable family structures.³⁰

Authors like Aneeza Pervez and Syeda Shahida have studied the chaos in the relationships of children highlighting the adverse effects that polygamous family structures, particularly polygyny, have on children's social and emotional development. Their findings indicate that polygamy often leads to the disintegration of the family unit, deprivation and social, economic and educational constraints, resulting in strained relationships between children and their fathers.³¹ Participants reported feelings of resentment, distrust, and emotional detachment toward their fathers, who were perceived as prioritizing their second families over their children from the first marriage.³² The authors highlight that relationships with stepfamilies were marked by hostility, jealousy, and detachment, with stepmothers and step siblings often perceived as threats.³³ The study also found that these experiences negatively affected participants' romantic and marital relationships in adulthood, with mistrust mostly in women and fear of betrayal.³⁴ Overall, the research concludes that exposure to polygamy creates long-term relational chaos for children, affecting their ability to form healthy interpersonal bonds throughout their lives.

Ismail Shaiful Bahari and his fellow researchers conducted a study on the psychological Impact of polygamous marriage on women and children and found that polygamous marriages play a key role in the development of a child not only socially but mentally.³⁵ They conducted a comparative psychological study between women and children in monogamous marriages and

²⁹ Amin F, Ali A, Ahmad S, Dr. Shakoor A, Dr. Sajjad A, Umer Z, 'Effects of polygamous marriages on familial life' 18 *Webology* 6, 2021, 8299.

³⁰ Amin F, Ali A, Ahmad S, Dr. Shakoor A, Dr. Sajjad A, Umer Z, 'Effects of polygamous marriages on familial life' 18 *Webology* 6, 2021, 8303.

³¹ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 22.

³² Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 22.

³³ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 33.

³⁴ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 33.

³⁵ Arif N., Aziz C., Bahari S, Hazlina N., Norhayati M., 'Psychological impact of polygamous marriage on women and children: a systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021, 8.

those in polygamous marriages. Empirically, women and children in polygamous marriages have higher scores in somatization, obsessive-compulsive, interpersonal sensitivity, anxiety, hostility, paranoia and psychoticism.³⁶ Children's mental stability has been found to directly affect their academic performance.

Another study conducted by Emmanuel Olusanjo and Timo Saloviita on "School Performance of Children from Monogamous and Polygamous Families in Nigeria" compares the academic performance of children from these two family structures. It finds that children from polygamous families reported more frequent difficulties in Mathematics and English.³⁷ Literature by Al-Krenawi and Lightman supports this finding, linking polygamous family structures with lower levels of learning achievement, a lower level of school adjustment, and a higher mean conflict rating than children from monogamous families.³⁸ Studies on children from polygamous families in Israel and South Africa also reveal lower academic achievement, poorer classroom behaviour, and higher absenteeism rates compared to their monogamous counterparts. Factors contributing to these outcomes include negative family relations between wives, jealousy, tension, emotional stress, insecurity and anxiety in polygamous households.³⁹

However, in a qualitative study conducted by Khasawneh Omar, Abdul Hakeem Yacin and Nassmat Salman in Jordan it was established that a contrasting view was held. The participants of the survey were wives, husbands and children who were in polygamous unions. The wives felt that the care, upbringing and education of their children were taken care of and not held back by their spouses. They acknowledged that their husbands provided education and proper housing for their children negating claims of neglect.⁴⁰ The children affirmed the mothers' position and stated that their fathers supported their education, upbringing and general financial support.⁴¹

³⁶ Arif N, Aziz C., Bahari S., Hazlina N, Norhayati M., 'Psychological impact of polygamous marriage on women and children: a systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021,7.

³⁷ Bamgbade E, Saloviita T, 'School performance of children from monogamous and polygamous families in Nigeria' 45 *Journal of Black Studies* 7, 2014, 629.

³⁸ Bamgbade E, Saloviita T, 'School performance of children from monogamous and polygamous families in Nigeria' 45 *Journal of Black Studies* 7, 2014, 623.

³⁹ Bamgbade E, Saloviita T, 'School performance of children from monogamous and polygamous families in Nigeria' 45 *Journal of Black Studies* 7, 2014, 631.

⁴⁰ Khasawneh O, Hijazi A, Salman N, 'Polygamy and its impact on the upbringing of children: A Jordanian perspective' 42 *Journal of Comparative Family Studies* 4, 2011, 572.

⁴¹ Khasawneh O, Hijazi A, Salman N, 'Polygamy and its impact on the upbringing of children: A Jordanian perspective' 42 *Journal of Comparative Family Studies* 4, 2011, 572.

Summarily, their study focused on polygamy and its impact on the stability of the family and society in general, as well as on the upbringing of children, their education and finances.

While existing literature has extensively explored the social, psychological, and economic impacts of polygamy on children, there remains a significant gap in examining how Kenyan law addresses the best interests of children in polygamous families. Scholars have discussed the challenges of applying the best interests principle and the tensions between statutory and customary laws, but none have analyzed Kenya's legal framework through the lens of the best interests of the child in the context of polygamy. My research will fill this gap by evaluating how Kenyan law, specifically statutory provisions, aligns with the best interests principle when addressing issues such the welfare of children in polygamous settings. This analysis will provide a unique perspective on the adequacy of Kenya's legal system in safeguarding children's rights in such family structures.

1.11 Research Methodology

This study will adopt a qualitative research methodology. It will utilize doctrinal legal research and socio-legal analysis to provide a comprehensive examination of the issue. The doctrinal approach will focus on analyzing primary legal sources, specifically the Children Act 2022. Additionally, the study will also incorporate secondary sources including scholarly articles. This will provide a deeper understanding of the impact of polygamy on children. By integrating insights from existing literature which incorporates testimonials or interviews. This research methodology will enable the evaluation of the Kenyan legal framework and practical implications of polygamy, culminating in evidence-based recommendations for legal reform to better protect and promote the best interests of children.

1.12 Chapter Breakdown

Chapter One will provide an overview of the research, including the background, problem statement, research objectives, and questions. It will introduce the concept of the best interest principle, establish the importance of the topic, and outline the study's scope and methodology. The chapter will also briefly justify the study and discuss its significance within the Kenyan legal context.

Chapter Two will explore the theoretical and legal foundations of the best interest principle of a child. It will discuss the rationale, development, and interpretation of the best interest principle, drawing from international frameworks such as the United Nations Convention on the Rights of the Child (UNCRC). The chapter will also examine the application of the best interest principle in Kenya under key laws, including the Constitution of Kenya 2010 and the Children Act 2022, with an emphasis on relevance to polygamous customary unions.

Chapter Three will analyze the impact of polygamy on children, using insights from scholarly works and quantitative studies. It will highlight how polygamous family dynamics, including resource allocation, emotional neglect, and stigma, challenge the fulfilment of the best interest principle. Comparisons with monogamous families will provide a broader understanding of the issue.

Chapter Four will examine the extent to which Kenyan law addresses the best interests of children in polygamous unions. It will review provisions under the Children Act 2022 to determine its adequacy in protecting children in polygamous customary settings using the best interest principle.

Chapter Five will provide an evaluation of the gaps identified in Kenyan law regarding the protection of children's best interests in polygamous unions. It will integrate insights from previous chapters to propose actionable reforms. The chapter will also provide recommendations aimed at enhancing the Kenyan legal framework to better address the unique needs of children in polygamous customary families. These suggestions will emphasize aligning Kenyan law with the best interest principle while considering cultural, social, and legal complexities. The chapter will conclude by emphasizing the importance of implementing these reforms to ensure equitable protection and holistic development for children in polygamous customary unions.

CHAPTER TWO: UNDERSTANDING THE BEST INTEREST PRINCIPLE

2.1 Introduction

The Best Interest principle of the child is a vital part of child welfare and the legal framing of child-related policies, for it serves as a guide. Internationally, this principle has been established in the United Nations Conventions on the Rights of the Child (UNCRC) under Article 3, which mandates that the best interests of the child should be a primary consideration in all actions concerning children undertaken by public or private social welfare agencies, judicial and administrative processes.⁴² Despite its universality, the practical application of this principle differs across jurisdictions, shaped by distinct cultural and societal factors.

In Kenya, the best interest principle is constitutionally recognized under Article 53(2) of the Constitution 2010, which states that a child's best interests are of paramount importance in every matter concerning the child.⁴³ The principle is further codified in the Children Act (2022) under section 4, which builds up on the constitutional provision offering a detailed legislative framework for safeguarding children's welfare. However, the best interests of children in polygamous customary marriages are seldom addressed. Polygamy has been found to have a negative impact on children such as unequal allocation of financial and emotional needs.

This chapter will focus on examining the best interest principle's conceptualization and application internationally and in Kenya.

2.2 Understanding the Formulation of the Best Interest Principle

The principle of the best interests of the child is a fundamental concept in international and domestic legal frameworks relating to children's welfare. This principle was first mentioned in the 1959 Declaration of the Rights of the Child, which emphasized its importance as the "paramount consideration" in matters concerning children.⁴⁴ However, this principle was implied by the 1924 Geneva Declaration of the Rights of the Child. This Declaration stated that

⁴² Article 3, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

⁴³ Article 53, *Constitution of Kenya*, (2010).

⁴⁴ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 5.

mankind owed the child ‘the very best that it has to give.’⁴⁵ The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also incorporated this principle under Article 5(b) which stated, concerning family education, that the child's best interests should be ‘the primordial consideration’. Additionally, concerning guardianship, the child’s interests should be ‘paramount’ under Article 16.⁴⁶ The best interest principle was further reinforced with the United Nations Convention on the Rights of the Child (UNCRC) adoption in 1989. Article 3(1) of the UNCRC asserts that the best interests of the child must be "a primary consideration" in all actions affecting children, whether undertaken by public institutions, courts, or legislative bodies. Therefore, it can be inferred that the principle dates back to the twentieth century when civilized nations recognized that the child needed more protection.

The move from the child’s best interests being regarded as a "paramount consideration" in the prior Conventions to a "primary consideration" in Article 3(1) of the UNCRC reflects a deliberate intent to balance between prioritizing children’s welfare and acknowledging competing rights and interests. The concept of paramountcy, as used in England’s Children Act 1989, places the child’s welfare as the overriding factor in decisions concerning them.⁴⁷ However, in the UNCRC, the phrase "primary consideration" allows for harmonization with other rights and duties, such as those of parents, guardians, and the broader public, as outlined in Articles 3(2) and 3(3).⁴⁸ This approach ensures that the child’s best interests are given significant weight and that they are not considered in isolation but within a framework that respects the interdependence and indivisibility of all rights and parties under the Convention. This balance provides a more reasonable, considerate and equitable application of the principle across diverse contexts and jurisdictions.

⁴⁵ Jobeta T, Dinokopila B, ‘The best interests of the child principle in Botswana,’ 26 *University of Botswana Law Journal* 2, 2018, 21.

⁴⁶ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 5.

⁴⁷ Awal N and George M, ‘The best interest principle within Article 3(1) of the United Nations Convention on the Rights of the Child’ 19 *International Journal of Business, Economics and Law* 4, 2019, 31.

⁴⁸ Awal N and George M, ‘The best interest principle within Article 3(1) of the United Nations Convention on the Rights of the Child’ 19 *International Journal of Business, Economics and Law* 4, 2019, 31

The drafters of the Convention intentionally used ‘a’ primary consideration instead of ‘the’ primary consideration under Article 3 to suggest that the best interests of the child are to be considered, but that several other factors must also be considered.⁴⁹ By designating it as "a primary consideration," the Convention ensures the child’s welfare holds significant weight without necessarily overriding all other considerations, promoting flexibility and fairness in decision-making processes.⁵⁰ The principle of the 'best interests of the child' is a recurring theme throughout the Convention on the Rights of the Child, with specific emphasis on various key provisions. Article 9 highlights the importance of considering the child's best interests when determining matters of family separation, while Article 18 underscores parental responsibility in ensuring the child’s welfare. Articles 20 and 21 extend this principle to decisions on foster placement and adoption, respectively. Additionally, Article 37 mandates that the child's best interests must guide any deprivation of liberty, and Article 40 ensures that juvenile justice processes uphold the child’s rights and dignity within this framework.⁵¹

The best interests principle performs different functions. First, research highlights that the principle should form the basis for evaluating the laws and practices of State Parties even in matters not regulated by the Convention on the Rights of the Child.⁵² Secondly, the best interests principle, as outlined in Article 3 of the UNCRC, serves an interpretive function by guiding the construction and application of children's rights, thereby creating specific obligations and influencing decision-making in all matters concerning children. Third, the best interests principle is a mediatory concept within the UNCRC, helping to resolve conflicts by balancing the child’s rights with societal interests, for instance, in the criminal justice system where it guides decisions on the necessity and duration of detention.⁵³

⁴⁹ Alston P, Gilmour-Walsh B ‘The Best Interests of the Child; Towards a Synthesis of Children’s Rights and Cultural Values’ 2015, 11— <https://www.jstor.org/stable/24760683> on 28 November 2024.

⁵⁰ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 3.

⁵¹ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 2.

⁵² Fambasayi R, Moyo A, ‘The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe’ 36 *South African Journal on Human Rights* 1, 2020, 29.

⁵³ Fambasayi R, Moyo A, ‘The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe’ 36 *South African Journal on Human Rights* 1, 2020, 29.

There exist two key dimensions of the best interest principle. The first is a general social duty, where parents are expected to raise their children following moral values and societal norms. The second is more child-centred, requiring parents or guardians to consider the child's unique needs, including their health, abilities, and personal development, to ensure that the care and education provided suit the child's individual circumstances.⁵⁴ Domestically, the best interests principle had long been included in the legal systems of several countries, although its scope was generally limited to matters of divorce, adoption and custody.⁵⁵ Unlike earlier frameworks that primarily focused on family law matters, the UNCRC broadened the scope of the principle to include a wide range of contexts, making it a central standard for decision-making processes that impact children.⁵⁶

2.3 Interpretation and application of the best interests of the child principle

According to Article 3 of the Convention on the Rights of the Child, the best interests principle should be applied by various actors, including public and private bodies, legislative bodies and administrative authorities.⁵⁷ The child's best interests are a primary consideration, and the evidentiary burden lies with those who desire to achieve a non-child-centred decision to justify why the child's best interests should not be prioritized.⁵⁸ The drafters of the UNCRC intentionally excluded parents and/or guardians because they did not seek to impose specific duties but rather framed the principle as a guideline to inform decision-making processes without regulating private family decisions.⁵⁹

Children's rights experts upheld that the content and nature of this principle makes two points. Firstly, Article 3 of the UNCRC does not impose any specific obligations on member states but rather requires that the principle be prioritized in decision-making processes concerning matters

⁵⁴ Roxana Ionescu, 'The best interests of the child' *Annals of "Dunarea de Jos" 4 University of Galati: Legal Sciences* 26, 2021, 80.

⁵⁵ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 2.

⁵⁶ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 2.

⁵⁷ Article 3, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

⁵⁸ Alston P, Gilmour-Walsh B 'The Best Interests of the Child; Towards a Synthesis of Children's Rights and Cultural Values' 2015, 12— <https://www.jstor.org/stable/24760683> on 28 November 2024.

⁵⁹ Alston P, Gilmour-Walsh B 'The Best Interests of the Child; Towards a Synthesis of Children's Rights and Cultural Values' 2015, 10— <https://www.jstor.org/stable/24760683> on 28 November 2024.

affecting a child. Secondly, the principle is a ‘rule of procedure’, ‘the foundation for a substantive right’ and an ‘interpretative legal principle’.⁶⁰ As a ‘rule of procedure’, the decision-maker must as a matter of priority consider the impact of the decisions on the interest of the child. The principle as ‘the foundation for a substantive right’ means that there is a guarantee by signatory states that the best interests of the child would be given priority. Finally, as an ‘interpretative legal principle’ it means that the best interests principle, as an interpretative guideline, aims to prevent adults from exercising unchecked authority over children by ensuring that all decisions affecting them prioritize their rights, welfare, and overall well-being.⁶¹

The principle has been criticized for its lack of specific, objective guidelines on what entails the best interests of the child, leaving significant room for subjective interpretation.⁶² Interpretation may be affected by cultural context, for instance, gendered interpretation and understanding of what is in the best interests of the girl child as compared to a boy’s.⁶³ In some cultures, gender roles in households often result in deprivation of the female child’s best interests, such as prioritizing boys’ education over girls’ domestic roles, which reflects inequalities.⁶⁴

Despite the Convention not providing for how to determine what constitutes the best interests of a child, two methods have been identified: an objective approach, which considers universal factors like maintaining bonds with both parents, proper health care, and a subjective approach, which works on a case-by-case basis and incorporates the child’s views and preferences, depending on their age and maturity.⁶⁵ The European Court of Human Rights upheld this subjective approach in the case of *Hokkanen v Finland*, stating that in applying the best interests principle, focus should be placed on the child’s freedom of expression and wishes.⁶⁶ Article 12 the Convention states that the child who is capable of forming an opinion on matters affecting

⁶⁰ Jobeta T, Dinokopila B, ‘The best interests of the child principle in Botswana,’ 26 *University of Botswana Law Journal* 2, 2018, 23.

⁶¹ Jobeta T, Dinokopila B, ‘The best interests of the child principle in Botswana,’ 26 *University of Botswana Law Journal* 2, 2018, 24.

⁶² Kehler J, ‘In the best interests of a child’: Thoughts on the draft Children’s Bill from a gender perspective’ 17 *Agenda*, 56, 2003, 47.

⁶³ Kehler J, ‘In the best interests of a child’: Thoughts on the draft Children’s Bill from a gender perspective’ 17 *Agenda*, 56, 2003, 48.

⁶⁴ Kehler J, ‘In the best interests of a child’: Thoughts on the draft Children’s Bill from a gender perspective’ 17 *Agenda*, 56, 2003, 48.

⁶⁵ Alston P, Gilmour-Walsh B ‘The Best Interests of the Child; Towards a Synthesis of Children’s Rights and Cultural Values’ 2015, 12— <https://www.jstor.org/stable/24760683> on 28 November 2024.

⁶⁶ Jobeta T, Dinokopila B, ‘The best interests of the child principle in Botswana,’ 26 *University of Botswana Law Journal* 2, 2018, 25

him or her has the right to express that opinion freely and that the child's opinion should be given due weight in accordance with his or her age and maturity.⁶⁷

It has been argued that this blend of objective and subjective elements ensures a comprehensive evaluation of the child's needs and rights since the objective approach may fail to take into account the difference in the child's experiences and circumstances.⁶⁸ However, there are three primary arguments against self-determination by children. The first concern is maturity, as children may lack the ability to make fully informed decisions. Secondly, they are highly susceptible to external influences, making them vulnerable to manipulation. Lastly, there is the risk that immediate preferences expressed by the child may conflict with what is objectively in their long-term best interests, such as choosing a less strict parent in custody disputes at the expense of stability or educational opportunities.⁶⁹

The United Nations Convention on the Rights of the Child has been ratified by 196 countries. Significant progress has been made in some countries that are signatories of the Convention to expand the application of the principle. Norway has experimented with assessing the impact of national budgets on children, laying the groundwork for government accountability.⁷⁰ Sweden adopted a National Strategy for the Implementation of the Convention on the Rights of the Child, requiring child impact analyses to be included in decision-making processes, with notable changes in asylum law applications. In Belgium, the Flemish Parliament mandates that all proposed decrees directly affecting children's rights must include a report on their impact on children.⁷¹ In South Africa, the South Africa Law Commission released a new Draft Children's Bill that integrates the best interests principle into its legislation, socio-economic issues like poverty and child-headed households.⁷² It emphasizes respect for children's dignity, fairness,

⁶⁷ Article 12, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

⁶⁸ Alston P, Gilmour-Walsh B 'The Best Interests of the Child; Towards a Synthesis of Children's Rights and Cultural Values' 2015, 12— <https://www.jstor.org/stable/24760683> on 28 November 2024.

⁶⁹ Alston P, Gilmour-Walsh B 'The Best Interests of the Child; Towards a Synthesis of Children's Rights and Cultural Values' 2015, 12— <https://www.jstor.org/stable/24760683> on 28 November 2024.

⁷⁰ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 9.

⁷¹ Council of Europe, *The principle of the best interests of the child – What it means and what it demands from adults*, 2008, 9.

⁷² Kehler J, 'In the best interests of a child': Thoughts on the draft Children's Bill from a gender perspective' 17 *Agenda*, 56, 2003, 48.

equitable treatment and protection from harmful cultural practices while allowing for meaningful participation in decisions based on their age and maturity.⁷³

Despite the UNCRC forming the basis of the best interest principle, international as well as regional human rights instruments have also made provision for it. The United Nations Convention on the Rights of Persons with Disabilities (2006) under Article 7(2) provides for the best interests of children with disabilities.⁷⁴ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) in its preamble provides for the need to ensure that intercountry adoptions prioritize the child's best interests and fundamental rights, while also preventing child abduction, trafficking, and exploitation.⁷⁵ Additionally, The African Charter on the Rights and Welfare of the Child (1990) under Article 4 establishes that in all actions concerning the child undertaken by any person or authority, the child's best interests shall be the primary consideration.⁷⁶ Similarly, the European Convention on the Exercise of Children's Rights (1996) provides for the child's best interests but particularly in judicial cases, under Article 6 which stipulates that in cases involving a child, the judicial authority must first assess whether it has enough information to make a decision that serves the child's best interests.⁷⁷

2.4 How the Best Interests Principle has been applied in Kenya

2.4.1 Legal framework and constitutional foundation

The best interests of the child principle is a fundamental aspect of Kenya's child rights framework, enshrined in Article 53(2) of the Constitution of Kenya 2010. This provision unequivocally states that "a child's best interests are of paramount importance in every matter concerning the child,"⁷⁸ signalling the country's strong commitment to aligning its domestic laws with international standards, particularly the United Nations Convention on the Rights of the Child (UNCRC). This constitutional provision provides guaranteed protection and promotes

⁷³ Kehler J, 'In the best interests of a child': Thoughts on the draft Children's Bill from a gender perspective' 17 *Agenda*, 56, 2003, 49.

⁷⁴ Article 7(2), *United Nations Convention on the Rights of Persons with Disabilities*, 13 December, 2006, UNTS 2515.

⁷⁵ Preamble, *United Nations Convention on the Rights of Persons with Disabilities*, 13 December, 2006, UNTS 2515.

⁷⁶ Article 4, *African Charter on the Rights and Welfare of the Child*, 11 July 1990.

⁷⁷ Article 6, *European Convention on the Exercise of Children's Rights*, 25 January, 1996, ETS 169

⁷⁸ Article 53, *Constitution of Kenya*, (2010).

children's welfare in Kenya, ensuring their needs are prioritized in legal, administrative and family decisions.

Kenya's commitment to this principle is further operationalized through the Children Act (2022), consolidating various child protection laws into a single statute. The Act explicitly provides guidelines for determining and implementing the best interests of the child in various contexts, including custody disputes, adoption, foster care, and juvenile justice. Section 4(3) of the Act mandates that judicial and administrative bodies, as well as any individuals resolving child-related disputes, must give primary consideration to the best interests of the child.⁷⁹ Additionally, the Act seeks to harmonize cultural practices with child protection laws by explicitly prohibiting harmful traditions under section 23(1)(b), ensuring that customary norms do not infringe the best interest principle.⁸⁰

2.4.2 Determining the best interests of the child

The First Schedule of Kenya's Children Act 2022 outlines specific considerations for determining the best interests of the child. These considerations include the child's emotional, physical, and educational needs; their safety and protection from harm; and the importance of maintaining relationships with both parents and other significant family members, where possible. It also emphasizes stability and continuity in the child's environment, prioritizing placements that support the child's development and well-being. Additionally, the child's views are to be considered, depending on their age and maturity, while avoiding unnecessary delays in making decisions affecting their welfare.⁸¹ These guidelines ensure that judicial and administrative bodies adopt a holistic approach when applying the best interests principle. The inclusion of a well-defined framework in the Children Act strengthens the principle's implementation by providing consistency in decision-making.

2.4.3 Case law and judicial interpretation

The application of the best interests principle has been tested in key legal cases, which illustrate both progress and challenges in its implementation. In The Institute for Human Rights and

⁷⁹ Section 4 (3), *Children Act* (Act No.29 of 2022).

⁸⁰ Section 23 (1), *Children Act* (Act No.29 of 2022).

⁸¹ First Schedule, *Children Act* (Act No.29 of 2022).

Development in Africa and Open Society Justice Initiative on behalf of children of Nubian descent in *Kenya v. Kenya*, the African Committee of Experts on the Rights and Welfare of the Child found that Kenya violated Nubian children's rights by denying them citizenship, rendering them stateless.⁸² The Committee ruled that this practice contradicted the best interests principle under both the Constitution and the ACRWC. It recommended that the Kenyan Government take corrective measures to ensure the registration of Nubian children as citizens, thereby reaffirming the importance of the principle in nationality matters.⁸³

Similarly, in *MWK v Attorney General*, a young girl was found in possession of cannabis sativa, and law enforcement officers subjected her to humiliating treatment by taking and circulating naked photographs of her on social media.⁸⁴ The court held that this violated her dignity under Article 28 of the Constitution and failed to uphold her best interests.⁸⁵ The ruling reinforced that the best interests principle requires authorities to handle children in a manner that prioritizes their welfare and upholds their fundamental rights.

2.4.4 Customary law and the best interests principle

Kenya recognizes customary law as a valid source of law under Section 3 of the Judicature Act, provided it is not repugnant to justice and morality or inconsistent with written law.⁸⁶ Customary norms significantly influence child-rearing practices, often prioritizing collective responsibility over individual autonomy. A notable example is the Kipsigis community, a Kalenjin sub-tribe, where the best interests of the child are upheld by reinforcing the child's ties to the extended family and local community.⁸⁷ Unlike the UNCRC, which emphasizes individual rights, Kipsigis customary law emphasizes communal support structures. Under this system, extended family members including distant relatives are expected to provide economic, social, and emotional

⁸² Jobeta T, Dinokopila B, 'The best interests of the child principle in Botswana,' 26 *University of Botswana Law Journal* 2, 2018, 25.

⁸³ Jobeta T, Dinokopila B, 'The best interests of the child principle in Botswana,' 26 *University of Botswana Law Journal* 2, 2018, 25.

⁸⁴ Fambasayi R, Moyo A, 'The best interests of the child offender in the context of detention as a measure of last resort: A comparative analysis of legal developments in South Africa, Kenya and Zimbabwe' 36 *South African Journal on Human Rights* 1, 2020, 34.

⁸⁵ Article 28, *Constitution of Kenya*, (2010).

⁸⁶ Section 3, *Judicature Act (Act No 6 of 1967)*.

⁸⁷ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 554 .

support to children, particularly in cases of parental absence due to illness or death.⁸⁸ This approach contrasts with Western-influenced individual rights frameworks but aligns with broader child protection goals.

The key pillars of the best interests principle according to Kipsigis customary law include promoting harmonious coexistence between the child and the clan or family members, ensuring the long-term welfare of the child, adhering to parental obligations under customary norms, and adopting a contextual understanding of the child's unique needs. These cultural practices reflect a broader communal responsibility for child-rearing. This demonstrates how customary law shapes the interpretation and application of the best interests principle within local communities, emphasizing collective responsibility and the importance of sustaining family relationships for the holistic development of the child.⁸⁹

2.5 Conclusion

In conclusion, the principle of the child's best interests is an important concept in both international and Kenyan child protection laws. While universally recognized, its application often reflects the social, cultural and economic contexts of different jurisdictions. Kenya has made significant strides in integrating this principle into its Constitution and legislative frameworks, particularly through the Children Act (2022) and its First Schedule. However, challenges such as resource limitations, cultural complexities, and gaps in implementation persist. Strengthening legal enforcement, addressing systemic barriers, and prioritizing children's welfare in all decisions are essential to fully realizing this principle in practice.

⁸⁸ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 556.

⁸⁹ Ngira D, 'Understanding children's rights from a pluralistic legal context: multi-legalities and the protection of the best interests of the child in rural Kenya' 53 *The Journal of Legal Pluralism and Unofficial Law* 3, 2021, 554 .

CHAPTER THREE: THE IMPACT OF POLYGAMY ON THE BEST INTERESTS OF THE CHILD

3.1 Introduction

Interpersonal relationships are of utmost importance to an individual's social and emotional growth. The most important social relation that develops a person is the family. The family serves as the primary influence on a child's social development, shaping how they interact with society and view themselves and others.⁹⁰ Therefore, the family structure one is born into significantly influences the person one becomes. Research posits that the family environment is the main cause of response and stimulus in the formation of a child's personality.⁹¹ Polygamous family structures after extensive research have been found to have a profound negative impact on children. Additionally, polygamy tends to be ignorant of the best interests of the children, leaving a remarkable effect on their mental health, academic achievements, interpersonal relations and social adjustment of the children.⁹²

Polygamy is defined as the simultaneous marriage of one man to multiple wives.⁹³ It is predominantly widespread in cultures such as those found in the Middle East, Asia and Africa.⁹⁴ Based on surveys, an estimated one in four married women in Africa are in polygamous marriages and the same ratio of children under 14 years were born to polygamous marriages.⁹⁵ In Kenya, the legislators while drafting the Marriage Act No.4 of 2014, to amend and consolidate the various laws relating to marriage saw it best to take the bold step of "elevating" polygamy to a statutory status in a bid to put all forms of marriage on an equal platform upon registration.

⁹⁰ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 30.

⁹¹ Marzuqi M, Dinniar C, 'The impact of polygamous Parents on children's stress level development' 4 *International Journal of Social and Management Studies* 5, 2009, 84.

⁹² Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 30.

⁹³ Lawson D, Gibson M, 'Polygynous marriage and child health in sub-Saharan Africa: What is the evidence for harm?' 39 *Demographic Research* 6, 2018, 181.

⁹⁴ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 30.

⁹⁵ Lawson D, Gibson M, 'Polygynous marriage and child health in sub-Saharan Africa: What is the evidence for harm?' 39 *Demographic Research* 6, 2018, 180.

Polygamy in Kenya is only recognized by customary and Islamic marriages. This Chapter shall delve into the impact that polygamy has had on children.

3.2 Education

It is a fact that the level of educational attainment may be attributed to students' psychological and mental wellness. However, it has been confirmed that environmental conditions in various levels of social relations such as family and school may also contribute to educational attainment. Therefore, it is accurate to conclude that a good family dynamic and structure may foster the potential for better academic outcomes for the children.⁹⁶ Studies conducted on the correlation between polygamy and the educational achievements of children in those unions have shown that children in monogamous unions score higher.⁹⁷

From the perspective of the best interests of the child, access to quality education is paramount as provided in article 28 of the UNCRC.⁹⁸ Education not only equips children with knowledge and skills but also promotes their social, emotional, and cognitive development, enabling them to participate fully in society and reach their full potential.⁹⁹ When family structures undermine a child's educational opportunities, they directly contravene the best interest principle. Furthermore, Article 32 states that children have the right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development.¹⁰⁰

A field study was conducted by Al Krenawi and Lightman where they compared the scholastic achievements of children from polygamous and monogamous families based on grades in four subjects which indicated a lower performance from the children in polygamous families. Other differences were noted in three categories namely; adjustment to the school framework, adjustment to the society of other children and adjustment to classroom norms. The children's

⁹⁶ Alahmadi A, Alqahtani M, 'The correlation between polygamy and educational achievement of children' 58 *Psychology and Education* 1, 2021, 2532.

⁹⁷ Alahmadi A, Alqahtani M, 'The correlation between polygamy and educational achievement of children' 58 *Psychology and Education* 1, 2021, 2532.

⁹⁸Article 28, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

⁹⁹ Unterhalter E, 'Conceptualising education for sustainable development' 49 *Cambridge Journal of Education* 4, 2019, 400.

¹⁰⁰ Article 28, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

social adjustment issues seem to stem from a problematic home environment of the polygamous families that spill over into the educational arena.¹⁰¹ The hostility of the home environment includes marital conflict; spousal conflict and jealousy between the co-wives, family violence as well as family disruptions. In an earlier research conducted by Al-Krenawi, it was also found that children from polygamous households scored lower than average in scholastic concentration, school attendance, homework completion and classroom motivation.¹⁰²

A quantitative study was conducted in Cameroon, where children and their teachers were interviewed. The teachers cited that the pupils from polygamous families were sometimes absent due to various reasons. The students from this union stated that they would be asked occasionally to care for their siblings whenever their parents went to stamp mills. They stated other reasons, such as helping in the mines, late payment of fees, herding cattle, family issues, no school requirements, no provision of food and lack of encouragement from home were among the reasons for their absenteeism.¹⁰³ The teachers reported that inadequate finances, social issues, psychological issues and lack of parental support in doing school work are the major challenges that pupils face in polygamous families.

Parental involvement in a child's education has been found to have a positive impact on their performance. However, in polygamous unions, there's little to no involvement. This is due to factors such as the high number of children in school, unpaid fees, and lack of school requirements, leading to poor supervision and diminished accountability for pupils, who may neglect their responsibilities knowing their parents are unlikely to attend consultation days.¹⁰⁴ The lack of finances and lack of parental support for children from polygamous families directly contravenes the principle of the best interests of the child. Educational achievement is a critical component of the best interests principle, as articulated in UNCRC Article 28, which emphasizes the right to accessible and quality education.¹⁰⁵

¹⁰¹ Al-krenawi, Lightman E, 'Learning achievement, social adjustment, and family conflict among Bedouin-Arab children from polygamous and monogamous families' 140 *The Journal of Social Psychology* 3, 2010, 351.

¹⁰² Bamgbade E, Saloviita T, 'School performance of children from monogamous and polygamous families in Nigeria' 45 *Journal of Black Studies* 7, 2014, 623.

¹⁰³ Andre P, Dupraz Y, 'Education and polygamy: Evidence from Cameroon' 162 *Journal of Development Economics*, 2023, 36.

¹⁰⁴ Andre P, Dupraz Y, 'Education and polygamy: Evidence from Cameroon' 162 *Journal of Development Economics*, 2023, 42..

¹⁰⁵ Article 32, *United Nations Convention on the Rights of the Child*, 20 November 1989.

3.3 The psychological and emotional impact

Building on the academic implications of polygamy on students, it is also crucial to explore its psychological and emotional effects. They have been discovered to be foundational in a child's academic achievement. The environment within polygamous families creates different circumstances from monogamous families that shape children's psychological and emotional development in profound ways. Several researchers have done quantitative studies comparing children from the two dynamics and found significant mental health differences. The psychological and emotional well-being of children is central to the principle of the best interests of the child. Article 39 of the UNCRC emphasizes on the recovery of children who are victims of psychological neglect, abuse or exploitation thus can be inferred that protection from the mentioned would serve as the child's best interests.¹⁰⁶ This section will discuss the emotional and psychological impact of polygamy on children.

3.3.1 Fragmented parental attention and emotional neglect

A primary challenge that children face in polygamous households is divided parental attention, which often leads to emotional neglect. A systematic review found that children from polygamous families scored higher on the Global Severity Index, indicating greater psychological distress compared to those from monogamous households.¹⁰⁷ These children are more likely to experience anxiety, hostility, obsessive-compulsive, paranoia, depression and interpersonal sensitivity.¹⁰⁸ Furthermore, the diluted parental resources in such households exacerbate feelings of provisional neglect.¹⁰⁹

The obligation of the State to ensure the protection and care necessary for a child's well-being,¹¹⁰ as outlined in Article 3, paragraph 2 of the UNCRC and further elaborated in General Comment No. 14 of the Child Rights Committee, is contravened in polygamous families where children experience emotional neglect. The terms "protection and care" must be read broadly,

¹⁰⁶ Article 39, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

¹⁰⁷ Arif N, Aziz C., Bahari S, Hazlina N., Norhayati M., 'Psychological impact of polygamous marriage on women and children: A systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021,7

¹⁰⁸ Arif N, Aziz C, Bahari S, Hazlina N, Norhayati M, 'Psychological impact of polygamous marriage on women and children: A systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021,7.

¹⁰⁹ Arif N., Aziz C., Bahari S., Hazlina N., Norhayati M., 'Psychological impact of polygamous marriage on women and children: A systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021,8

¹¹⁰ Article 3, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

encompassing not only the prevention of harm but also ensuring the child's holistic well-being, including emotional stability, attachment security, and access to a nurturing environment.

A study conducted in Israel explored the experiences of adolescents whose fathers remarried, revealing raw, deep, and candid insights into their lived experiences and emotional struggles. Research showed that during the initial years following a husband's remarriage, parents (especially fathers) are emotionally and physically unavailable to meet the needs of their adolescent daughters.¹¹¹ A distant or absent father negatively affects daughters' self-confidence and future relationships with other men, as paternal involvement, particularly emotional connection, is often denied in polygamous patriarchal contexts. Fathers in these settings tend to stick to customary masculine roles, focusing on financial support while relegating child-rearing responsibilities to mothers.¹¹²

This contravenes General Comment No. 14, paragraph 72, which emphasizes that children's well-being includes not only their basic material, physical, and educational needs but also their emotional and psychological stability.¹¹³ Without sustained emotional care, children from polygamous families often develop insecure attachments, contributing to long-term emotional distress and mental health issues. The failure of polygamous family structures to provide stable emotional care directly undermines the best interests of the child as required under Article 19 of the UNCRC, which mandates that children be protected from all forms of physical or mental violence, injury, neglect, maltreatment, or exploitation while in the care of parents or legal guardians.

3.3.2 Sibling rivalry and competitive family environments

Pervez and Batool's research contained interviewees' responses when they were requested to comment on the state of their relationship with their step-family. One of the participants categorically stated that they severely hated the father's second wife and added that the other woman knew he had a family and still proceeded to destroy the family. Another stated that they

¹¹¹ Alhuzail N, 'I wish he were dead the experience of loss among young Arab-Bedouin women in polygamous families' 3 *Feminist Inquiry in Social Work* 1, 2023, 78.

¹¹² Alhuzail N, 'I Wish he Were Dead The Experience of Loss among Young Arab-Bedouin Women in Polygamous Families' 3 *Feminist Inquiry in Social Work* 1, 2023, 79.

¹¹³ *UNCRC General Comment No 14, Right of the child to have his or her Best Interests taken as a primary consideration*, 29 May 2013, 16.

are jealous of the stepfamily because they receive the father's love, attention, and support while they are left to use their own devices to manage themselves.¹¹⁴ The competitive dynamics among co-wives in polygamous families often extend to sibling relationships, leading to rivalry and strained interactions.

3.3.3 Psychological distress and mental health outcomes

Children in polygamous families often experience significant psychological and social challenges, including feelings of neglect, social withdrawal, antisocial behaviour, academic decline, and aggression.¹¹⁵ Many of the children in this union struggle to reconcile their fathers' actions, leading to lower respect and emotional distress.¹¹⁶ They are frequently exposed to domestic conflicts, such as verbal and physical abuse against their mothers, and endure insults from the community about their father, further deepening their sense of isolation. Feeling neglected by their fathers and witnessing parental conflicts, some children become aggressive toward their fathers to the point of wishing them dead¹¹⁷ while remaining loyal to their mothers. Mothers, despite their psychological instability, bear the heavy responsibility of managing their children's behaviour with their fathers'.

Polygamy's psychological effects on children are both immediate and long-lasting. Anxiety, depression, and trauma are common among children in polygamous families. In a study by Syafiq and Dinniar, children in polygamous households were found to exhibit significantly higher levels of stress and anxiety compared to their peers in monogamous families. This is because the father initially only focused their attention on one family, but then upon the second marriage, fathers divided their attention which created anxiety in the children.¹¹⁸

Daughters, in particular, face unique psychological challenges. Many develop a pervasive fear of intimacy and a distrust of men, stemming from feelings of betrayal by their fathers. As one

¹¹⁴ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 33.

¹¹⁵ Nasser-Najjab N, ' Polygamy, family law, and the crisis of governance in Palestine' 36 *Journal of Family Issues* 8, 2015, 1089.

¹¹⁶ Nasser-Najjab N, ' Polygamy, family law, and the crisis of governance in Palestine' 36 *Journal of Family Issues* 8, 2015, 1089.

¹¹⁷ Alhuzail N, 'I wish he were dead the experience of loss among young Arab-Bedouin women in polygamous families' 3 *Feminist Inquiry in Social Work* 1, 2023, 81.

¹¹⁸ Marzuqi M, Dinniar C 'The Impact of Polygamous Parents on Children's Stress Level Development' 4 *International Journal of Social and Management Studies* 5, 2022, 83.

participant of an interview noted, "I cannot trust men, especially after seeing what my father did to my mother. It takes me a good time to judge someone and know them and only then do I get involved in a relationship."¹¹⁹ Adolescent daughters in Arab-Bedouin society experience their fathers' second marriages as a deep emotional loss that has caused them to feel hatred, rejection and betrayal.¹²⁰ They feel abandoned and replaced by their fathers, who they see as no longer fulfilling their role as protectors and caregivers. This loss they described as worse than death because their father is still alive but absent from their lives, leaving the daughters feeling rejected and forgotten. Many also lose confidence and the sense of safety their fathers once provided.¹²¹ The second wife is often viewed as an inhuman creature, described as an "evil" figure who has destroyed their family. They also experience their mothers' pain, taking on their sadness and struggles, which adds to their emotional burden. This situation creates a sense of the family being destroyed to build another, leaving the daughters feeling isolated, unloved, and emotionally unsupported. The trauma is so deep that it causes anxiety, depression, physical pain, and a loss of connection with both parents, making it hard for them to cope with the changes in their lives.¹²²

In an interview carried out in Lampung, Indonesia, children admitted to carrying trauma, like being afraid to start relationships or even think about marriage because they fear their future partner might act like their polygamous parent.¹²³ Some children worry about being overlooked by their parent who might love and prioritize the other family more than them. Socially, they tend to keep to themselves, only talking to others when necessary and avoiding close connections, partly because their family life was distant and lacked strong bonds. To cope, some shut themselves off emotionally and focus only on their own lives, while others lean on siblings or friends who understand what they're going through.

¹¹⁹ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 33.

¹²⁰ Alhuzail N, 'I wish he were dead the experience of loss among young Arab-Bedouin women in polygamous families' 3 *Feminist Inquiry in Social Work* 1, 2023, 82.

¹²¹ Alhuzail N, 'I wish he were dead the experience of loss among young Arab-Bedouin women in polygamous families' 3 *Feminist Inquiry in Social Work* 1, 2023, 81.

¹²² Alhuzail N, 'I wish he were dead the experience of loss among young Arab-Bedouin women in polygamous families' 3 *Feminist Inquiry in Social Work* 1, 2023, 81.

¹²³ Marzuqi M, Dinniar C 'The impact of polygamous parents on children's stress level development' 4 *International Journal of Social and Management Studies* 5, 2022, 87.

The instability in this particular family structure impacts children's development. Instability in families leads to behavioural issues, particularly for daughters who often exhibit risky sexual behaviour, having an early sexual debut.¹²⁴ This can be attributed to the denial of fatherly connection and the depravity of emotional needs. Additionally, dysfunction in families leads to negative cognitive and educational outcomes. Researchers have also discovered that family instability directly affects children's health. These children are more likely to be diagnosed with acute conditions such as asthma and overall worse health compared to those from stable homes. The change in romantic partnership of parents in polygamous marriages causes stress and strain in positive engagement and parenting.¹²⁵ Parenting is affected by the detrimental mental effects polygamy has on the women who are required to play the nurturing role in their children's lives. The women in such unions have been found, according to a systematic review and meta-analysis conducted to assess the impact of polygamous marriages on women and children, to have two times higher risk of developing depression compared to monogamous marriages.¹²⁶

The environment in which the children are brought up is not conducive due to the hatred and jealousy among the wives, which stems from the husband's preference for a particular wife. The women are also subjected to physical and emotional violence from their husbands.¹²⁷ First mothers in polygamous marriages suffer from health conditions that are attributable to the union such as physical pains, shortness of breath, headache, insomnia or fatigue, they all complained about a nerve disorder and dryness between them and their husbands. They also reported that the husbands spend most of their time with the second family, neglecting their own, which affects the education of the children.¹²⁸

The failure of polygamous family structures to provide children with emotional and physical security contradicts the Best Interest Principle under Article 19 of the UNCRC, which mandates that children be protected from all forms of physical or mental violence, neglect, maltreatment,

¹²⁴ Gaydosh L, Harris K, 'Childhood family instability and young adult health' 59 *Journal of Health and Social Behavior* 3, 2018, 387.

¹²⁵ Smith C, Crosnoe R, Cavanagh S, 'Family instability and children's health' 66 *National Council on Family Relations* 4, 2017, 604.

¹²⁶ Arif N, Aziz C, Bahari S, Hazlina N, Norhayati M, 'Psychological impact of polygamous marriage on women and children: A systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021,7.

¹²⁷ Amin F, Ali A, Ahmad S, Dr. Shakoor A, Dr. Sajjad A, Umer Z, 'Effects of polygamous marriages on familial life' 18 *Webology*, 6, 2021, 8301.

¹²⁸ Alahmadi A, Alqahtani M, 'The correlation between polygamy and educational achievement of children' 58 *Psychology and Education* 1, 2021, 2533.

or exploitation while in the care of parents or legal guardians.¹²⁹ Moreover, Article 6 emphasizes the right of the child to develop to their full potential,¹³⁰ which is compromised in environments marked by instability, neglect, and psychological harm. Ensuring that children are raised in stable and emotionally supportive environments is fundamental to upholding their rights under international law.

3.4 The Economic Impact of Polygamy

Polygamy has substantial economic implications that affect households and society at large, particularly in resource-constrained areas. In many cases, resources such as land, income, and food are insufficient to meet the needs of all family members. In a study conducted in Marigat Division, Kenya, families in polygamous unions frequently struggle to provide basic needs, such as education, and proper healthcare, leading to persistent poverty.¹³¹ Inadequacy of resources, especially of land, is because husbands tend to favour the most loved wife with a larger share while leaving the other co-wives to share the little remaining with their children.¹³² This preferential treatment means that some children have better access to education, healthcare, and opportunities, while others are left without adequate support.

Mali has documented that the arrival of a co-wife reduces per capita income and household consumption levels, as limited resources are divided among multiple families.¹³³ Polygamous households also struggle with financial planning. Men are expected to provide for all their wives and children, but balancing these responsibilities is often difficult. Women, fearing income shock, try to save money on their own, especially if their husband decides to marry another wife or if the marriage ends in divorce.¹³⁴ The study in Marigat affirmed this by reporting that wives and children have had to support themselves financially by involving themselves in

¹²⁹ Article 19, *United Nations Convention on the Rights of the Child*, 20 November 1989.

¹³⁰ Article 6, *United Nations Convention on the Rights of the Child*, 20 November 1989, 44/25.

¹³¹ David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 24.

¹³² David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 28.

¹³³ Dissa Y, 'Polygamy in Mali: Social and economic implications on families' *27 International Journal of African and Asian Studies*, 2016, 102.

¹³⁴ Dissa Y, 'Polygamy in Mali: Social and economic implications on families' *27 International Journal of African and Asian Studies*, 2016, 102.

income-generating activities such as agriculture and handicrafts.¹³⁵ This forces children to drop out of school to meet family needs perpetuating this cycle of poverty.

From the perspective of the Best Interest Principle, as outlined in Article 3 of the UNCRC, financial stability and adequate resource allocation are essential in ensuring a child's well-being. The economic hardships associated with polygamous households often undermine a child's right to education, healthcare, and a standard of living that supports their full development, as guaranteed under Article 27 of the UNCRC.¹³⁶ The inability to meet these fundamental needs directly contravenes the best interests of the child, which should be prioritized in all decisions affecting them.

Families in polygamous unions often live in overcrowded conditions, with limited access to healthcare and social services. These factors exacerbate poverty and hinder economic development at the community level. Studies in Kenya and Mali have consistently highlighted the correlation between polygamy and poverty, as households in polygamous unions are more likely to face economic hardships compared to monogamous households.¹³⁷

3.5 Conclusion

In conclusion, polygamy significantly affects children's academic performance, psychological well-being, and overall development. The instability, fragmented parental attention, and economic hardships associated with polygamous families create an environment that often leads to lower educational achievements, emotional distress, and social adjustment difficulties. Studies consistently show that children in polygamous households experience higher levels of anxiety, depression, and strained interpersonal relationships due to competition among co-wives and siblings. Additionally, financial struggles in such families contribute to limited access to education, healthcare, and essential resources, perpetuating cycles of poverty and emotional neglect. The evidence overwhelmingly suggests that the polygamous family structure does not

¹³⁵ David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 28

¹³⁶ Article 27, *United Nations Convention on the Rights of the Child*, 20 November 1989.

¹³⁷ Dissa Y, 'Polygamy in Mali: Social and economic implications on families' *27 International Journal of African and Asian Studies*, 2016, 106.

prioritize the best interests of children, instead exposing them to a range of adverse social, psychological, and economic consequences that can have lasting effects on their future.

CHAPTER FOUR : ADEQUACY OF THE CHILDREN ACT 2022 IN PROTECTING CHILDREN’S BEST INTERESTS IN POLYGAMOUS UNIONS

4.1 Introduction

The principle of the child's best interests is a fundamental legal standard in both domestic and international law, ensuring that all decisions affecting children prioritize their well-being. However, in the context of polygamous families, this principle is often compromised due to emotional neglect and financial disparities. While the Children Act 2022 provides a legal framework for protecting children, its application in polygamous settings raises concerns about its adequacy in safeguarding children's emotional, financial, and legal rights. This chapter assesses whether the Children Act 2022 sufficiently upholds the best interests of children in polygamous unions by analyzing provisions on parental responsibility, child maintenance. Through assessing statutory provisions and case law, this chapter identifies gaps in the current legal framework and proposes reforms to ensure that all children, regardless of their family structure, receive equal protection and opportunities.

4.2 Children Act 2022

4.2.1 Parental responsibility

Section 31 of the Children Act defines ‘parental responsibility’ as the duties, rights, powers, responsibilities, and authority a parent has to a child and their property, in accordance with the child's evolving capacities. These duties include maintaining the child by providing basic needs like nutrition, shelter, and education, as well as protecting the child from neglect, abuse, and discrimination.¹³⁸ Section 32, on the other hand, emphasizes equal parental responsibility, stating that both parents share equal responsibility (on an equal basis), and neither parent has a superior right or claim over the other in exercising such responsibility, whether or not the child is born within wedlock.¹³⁹ However, in the context of polygamous unions, these sections raise significant concerns about their adequacy in addressing equal parental responsibility among multiple

¹³⁸ Section 31, *Children Act* (Act No.29 of 2022).

¹³⁹ Section 32, *Children Act* (Act No.29 of 2022).

households. The inherent complexities of polygamous family structures, where parental attention and resources may be divided across multiple households, create unique challenges that the generalized framework of Sections 31 and 32 may not fully address.

A key area of concern is the potential for fragmentation of parental attention and emotional support. While the Act emphasizes the joint responsibility of both parents, the practical reality is that the father's time and energy are often divided among multiple wives and children. This can lead to feelings of neglect and emotional insecurity among children, particularly if there are pre-existing rivalries or tensions between co-wives. The Act does not adequately address how parental responsibilities should be shared or divided in such circumstances to ensure that each child receives the individual care and attention they need to thrive.

Section 31 defines and spells out the duties to be equally shared by the parents citing also the protection from neglect. Although Section 31 of the Children Act addresses neglect generally, it fails to recognise emotional neglect explicitly, which is often overlooked due to generalisation. Neglect of children has been defined as the failure of a parent to provide for their children's good development: health, education, affection, nutrition, shelter, and safe living conditions.¹⁴⁰ Emotional neglect, according to psychologists, is the parent's failure to respond adequately to a child's emotional needs.¹⁴¹ Emotional needs include: love, attention, support, trust and freedom.¹⁴² The deprivation of these emotional needs has long-term effects such as difficulty regulating emotions, low self-esteem, insecure attachment styles, depression, anxiety, lack of trust and self-isolation.¹⁴³

Children in polygamous unions often experience emotional neglect, strained relationships, and a deep sense of resentment toward their fathers. The second subsequent marriage creates distance, erodes trust, and shifts the father's priorities away from his children, leading to feelings of

¹⁴⁰ Marc B, Hanafy I, 'Children; Neglect', Science Direct, 2 October 2015

<https://www.sciencedirect.com/science/article/abs/pii/B9780128000342000677> on 14 February 2025

¹⁴¹ Holland K, 'Childhood Emotional Neglect: How It Can Impact You Now and Later' , 21 October 2021.

<https://www.healthline.com/health/mental-health/childhood-emotional-neglect#what-it-is> on 15 February, 2025.

¹⁴² Johnson E, 'What are the emotional needs of a child?' CPD Online, 26 February 2021,

<https://cpdonline.co.uk/knowledge-base/safeguarding/emotional-needs-of-a-child> on 15 February 2025.

¹⁴³ Ames H, 'How can childhood emotional neglect affect people?' Medical News Today, 14 November, 2023

<https://www.medicalnewstoday.com/articles/childhood-emotional-neglect#effects> on 15 February, 2025.

abandonment, manipulation, and emotional deprivation.¹⁴⁴ Fathers in polygamous unions often prioritize financial provision over emotional involvement, leaving children's emotional needs unmet. Daughters, in particular, may suffer from distant or absent fathers, impacting their self-confidence and future relationships.¹⁴⁵

Children in polygamous unions face a higher risk of psychological distress, including somatisation, obsessive-compulsive tendencies, interpersonal sensitivity, depression, anxiety, hostility, phobias, paranoia, and psychoticism.¹⁴⁶ The experience of polygamy is often accompanied by negative experiences such as the disintegration of the family unit, a sense of deprivation, and social, economic, and educational constraints. These experiences, in turn, shape the children's relationship with their fathers, with many reporting feelings of resentment and emotional detachment. Fathers' second marriages often lead to distant, impaired, and strained relationships characterized by condemnation, conflict, and a lack of trust.¹⁴⁷ It is in the child's best interests to have their emotional needs met in order to avoid such effects in their lives.

Given these realities, the Children Act 2022 does not fully address the unique circumstances of polygamous families. The current legal framework assumes a traditional nuclear family structure and does not provide clear guidelines on how fathers in polygamous unions should balance their responsibilities equitably. The law lacks provisions that ensure children from different households within a polygamous family receive equal attention, emotional support, and financial care. This gap in the law contributes to the emotional and psychological challenges faced by children in these unions. Therefore, legislative intervention is necessary to ensure that all children, regardless of their family structure, have their emotional, psychological, and financial needs met.

¹⁴⁴ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 33.

¹⁴⁵ Alhuzail N, 'I wish he were dead the experience of loss among young Arab-Bedouin women in polygamous families' 3 *Feminist Inquiry in Social Work* 1, 2023, 79.

¹⁴⁶ Arif N., Aziz C., Bahari S., Hazlina N., Norhayati M., 'Psychological impact of polygamous marriage on women and children: A systematic review and meta analysis' 21 *BMC Pregnancy and Childbirth* 1, 2021,7

¹⁴⁷ Pervez A, Batool S, 'Polygamy: Chaos in the relationships of children' 14 *Pakistan Journal of Social and Clinical Psychology* 1, 2016, 33.

4.2.2 Child maintenance

Sections 110 and 111 of the Children Act lay the foundation for child maintenance, establishing the shared responsibility of both parents to financially support their children, regardless of marital status. Section 110 outlines the joint maintenance of children, recognizing that both mothers and fathers have a duty to contribute to the maintenance of the child.¹⁴⁸ Complementing this, Section 111 empowers the courts to issue maintenance orders, legally compelling parents to provide financial support for their children's essential needs.¹⁴⁹ While these sections aim to ensure children receive adequate resources, their application within the complex reality of diverse family structures, particularly polygamous unions, reveals significant limitations.

The challenge lies in translating the principle of "shared responsibility" into equitable outcomes in situations where resources are stretched across multiple households. In polygamous families, the financial landscape is inherently more complex compared to monogamous families, with the father's income potentially divided among several wives and numerous children. Resource dilution theory, as discussed by Oberg, posits that as the number of children in a family increases, the available parental resources such as money, time, and emotional support become increasingly stretched, leading to a decline in individual child outcomes.¹⁵⁰ Consequently, children in polygamous unions are more prone to emotional and financial neglect.

Favouritism further exacerbates these challenges. In a study conducted by Mavhina, it has been indicated that the greatest problem among wives in a polygamous marriage is favouritism. When the husband shows a preference for a particular wife, this leads to jealousy and hatred towards the most favoured wife.¹⁵¹ The relationship between children and their mothers is also affected, the father usually takes sides and favours the children of the most favoured wife, and that in itself fuels anger and hatred towards himself.¹⁵² There is family neglect in polygamous families where children of unwanted wives are looked down upon. Jelimo's study interviewed Mugwanja, who

¹⁴⁸ Section 110, *Children Act* (Act No.29 of 2022).

¹⁴⁹ Section 111, *Children Act* (Act No.29 of 2022).

¹⁵⁰ Stefan Öberg, 'Too many is not enough: studying how children are affected by their number of siblings and resource dilution in families' 22 *The History of the Family* 3, 2017, 157.

¹⁵¹ Mavhina S, 'Traumatic conflict among polygamous children' Unpublished Thesis, University of Pretoria, Pretoria, 2010, 45.

¹⁵² David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 66

was the son of a less favoured wife, who noted that they had suffered as they had spent four days without having food and had now dropped out of school.¹⁵³

In research conducted in Marigat, the women reported financial neglect of their children by their fathers. They admitted that husbands pay school fees for those children of the most loved wives while the rest are left to their mothers who can not manage to support them since they do not have enough income due to fewer resources.¹⁵⁴ The majority reported inadequate resources, particularly land for agriculture, as husbands often favour their most loved wives in land distribution, forcing others to seek alternative livelihoods like casual labour, trading, and handcraft.¹⁵⁵ In supporting the family the husband often favours the junior wife to accord her and her children greater levels of economic and social support.¹⁵⁶

The Children Act, in its current form, lacks a clear framework for determining what constitutes a fair and adequate contribution from the father in such contexts. This absence of specific guidance can lead to inconsistencies in court decisions and potential inequities in the distribution of resources, leaving some children vulnerable to financial hardship due to favouritism. The Act also doesn't fully address the potential for income disparities among co-wives and how those may impact children's maintenance obligations.

To address these shortcomings, specific amendments to the Children Act are crucial. These amendments should include a structured formula for calculating maintenance obligations in polygamous cases, taking into account the father's total income, the number of children in each household, and the individual needs of each child. Additionally, the Act should provide clear guidance to courts on prioritizing the child's best interests when allocating limited resources, ensuring that basic needs such as education, healthcare, and adequate nutrition are met. Strengthening enforcement mechanisms for maintenance orders is also essential to ensure that

¹⁵³ David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 10.

¹⁵⁴ David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 24.

¹⁵⁵ David N, 'The socio-economic impact of polygamy on children in Marigat division Baringo district' Unpublished LLB Thesis, Kampala International University, Kampala, 2011, 24.

¹⁵⁶ Al-krenawi A, Graham J, Slonim-nevo V 'Mental Health Aspects of Arab-Israeli Adolescents From Polygamous Versus Monogamous Families' 142 *Journal of Social Psychology* 4, 2002, 456.

fathers are held accountable for their financial obligations to all their children, regardless of the complexities of their family structure or personal preferences.

4.3 Conclusion

The principle of the child's best interests is a cornerstone of both domestic and international law, yet its implementation within polygamous families remains inadequate under the current Kenyan legal framework. While the Children Act 2022 provides general provisions on parental responsibility and child maintenance, it fails to account for the unique challenges posed by polygamous unions, particularly in ensuring equal emotional, financial, and legal protection for all children. The law does not explicitly address emotional neglect, resource dilution, or favoritism, all of which significantly impact children's well-being in polygamous settings.

To bridge these gaps, legislative reforms are necessary to establish clear guidelines on parental responsibility, equitable financial maintenance, and the enforcement of children's rights within polygamous households. Incorporating structured maintenance formulas, recognizing emotional neglect as a form of child neglect, and strengthening judicial oversight in resource allocation would help safeguard the well-being of all children, irrespective of their family structure. Ultimately, ensuring that every child whether in a monogamous or polygamous family receives equal protection under the law is essential for upholding the fundamental principle of the child's best interests.

CHAPTER FIVE : CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study has undertaken a comprehensive examination of the intersection between Kenya's legal framework and the protection of children's rights within polygamous marriages. Through doctrinal analysis and socio-legal research methodologies, this study has revealed significant discrepancies between the theoretical protections enshrined in Kenyan law and the practical realities faced by children in polygamous households. The findings demonstrate that while Kenya has established progressive child protection mechanisms through Article 53 of the Constitution (2010) and the Children Act (2022), these provisions fail to adequately address the unique challenges posed by polygamous family structures. The study's analysis reveals several critical insights. First, while Kenya has made commendable strides in recognizing children's rights through instruments like the Children Act 2022, the legal framework remains insufficient in addressing the complex realities of polygamous households. The research demonstrates how polygamous family structures often create environments where children experience emotional neglect, financial disparities, and unequal access to developmental opportunities all of which contravene the fundamental principle of prioritizing children's best interests.

The study successfully addressed its four primary research objectives. First, it thoroughly examined the best interest principle, tracing its conceptual development and practical application in Kenya while identifying significant gaps in its enforcement for polygamous families. Second, it comprehensively documented the impacts of polygamy, presenting evidence of adverse effects on children's education, mental health, and economic stability. Third, it critically analyzed the adequacy of the Children Act 2022 exposing its failure to address polygamy-specific challenges. Finally, it proposed concrete reforms to enhance legal protections, fulfilling the fourth objective.

5.2 Legal gaps discovered

The examination of Kenya's legal framework, particularly the Children Act 2022, uncovers significant shortcomings. The Act's provisions on parental responsibility and child maintenance, while progressive in theory, fail to account for the unique dynamics of polygamous unions. Notably, the law lacks specific mechanisms to prevent and address emotional neglect or to

ensure equitable distribution of parental resources across multiple households. These legal gaps leave children in polygamous families particularly vulnerable to systemic inequalities and compromised welfare.

5.3 Recommendations

5.3.1 Legislative reforms to address parental responsibility gaps

Building on Chapter four analysis of Sections 31-32 of the Children Act 2022, the law requires amendments to specifically address polygamous family structures. The current provisions on parental responsibility fail to account for the fragmentation of attention and resources across multiple households. The Act should be revised to include explicit guidelines for fathers in polygamous unions, mandating equitable time allocation and emotional support for all children. This would operationalize the best interest principle by recognizing that parental responsibility extends beyond financial provision to include consistent emotional engagement. Furthermore, the law should establish clear consequences for fathers who disproportionately neglect certain households, with specific remedies for affected children.

5.3.2 Strengthening provisions against emotional neglect

The examination of emotional neglect in polygamous families reveals a critical gap in the Children Act's protective framework. The Act should be amended to expand Section 31's definition of neglect to explicitly include emotional neglect, with specific indicators relevant to polygamous contexts. These could include: prolonged absence of paternal contact, favoritism among siblings from different households, and exposure to inter-wife conflicts. The Children Act should mandate regular psychological assessments for children in polygamous families and establish reporting mechanisms for teachers and healthcare workers to identify signs of emotional distress. This would align Kenya's legislation with international standards on comprehensive child protection.

5.3.3 Reforming child maintenance provisions

The analysis in Chapter 4 of Sections 110-111 demonstrates the inadequacy of current maintenance provisions for polygamous families. The law should introduce a maintenance formula that accounts for: the father's total income, number of dependents across all households, and specific needs of each child. Courts should be empowered to consider the full scope of a father's financial obligations when making maintenance orders, preventing the common scenario where later marriages disadvantage children from earlier unions. The Act should also establish a public maintenance registry to track compliance across multiple households and enable enforcement actions against fathers who default on their obligations to any of their children.

5.3.4 Community-based approaches and parental education programs

To effectively safeguard children in polygamous communities, Kenya should implement culturally-grounded awareness programs that partner with traditional leaders and religious figures to develop child protection messages aligned with local values, while establishing community-led parenting workshops that teach equitable resource distribution, emotional care recognition, cooperative parenting between co-wives, and conflict resolution techniques. These initiatives should train respected community members as peer educators to model positive parenting, identify at-risk children, and mediate household disputes, while strategically incorporating child protection messaging into existing community structures like traditional council meetings, religious gatherings, women's groups, and school associations, using local languages and relatable scenarios to demonstrate practical ways polygamous families can uphold children's best interests without compromising cultural identity.

5.4 Conclusion

This study has exposed critical gaps in Kenya's legal framework regarding the protection of children in polygamous families. While the Constitution and Children Act 2022 establish progressive child rights protections, they fail to address the unique challenges of polygamous households, particularly concerning emotional neglect, equitable resource distribution, and fragmented parental responsibility. The study reveals how current provisions in the Children Act 2022 remain inadequate in safeguarding children's best interests in polygamous unions across multiple households, leaving them vulnerable to inequalities and compromised development.

The recommendations presented including legislative reforms to strengthen parental responsibility and maintenance provisions, judicial specialization for polygamous family cases, and culturally-sensitive community programs offer practical solutions to bridge these gaps. By implementing these measures, Kenya can ensure all children receive equal protection regardless of family structure while respecting cultural contexts. The achievement of the recommendations will require sustained commitment from lawmakers, judiciary, and communities to translate these proposals into meaningful change that truly upholds every child's right to care, dignity, and opportunity.

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