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EVALUATION OF THE KENYAN KADHI'S COURT BENCH BOOK FROM AN ISLAMIC SHARIA PERSPECTIVE: FOCUSING ON THE MARRIAGE SECTION

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ABSTRACT

This study critically evaluates the Kadhis Court Bench Book, specifically examining the marriage section in Chapter Four, Articles 1 through 20, via the framework of Islamic Sharia. It assesses the strengths and weaknesses of these provisions, focusing on aspects of clarity, consistency, and adherence to Islamic legal principles. The research problem regarding the enactment of the Kadhis Court Bench Book arises from the judiciary's acknowledgment of inconsistencies in verdicts resulting from divergent opinions among the various schools of thought. To conduct this evaluation, a qualitative approach will be adopted, using methods such as document analysis, comparative analysis, case study review, and data interpretation. The findings show that the Bench Book lacks systematic organization, with certain sections deviating from essential Sharia principles or offering insufficient clarity. The

reliance on lesser-known madhhabs in its application in Kenya contributes to inconsistencies, as certain provisions do not fully adhere to fundamental Sharia principles. Some provisions are difficult to implement and the arisal of ambiguities and gaps in specific provisions can lead to differing interpretations. Ultimately, the study recommends the creation of a systematical framework for continuous monitoring and evaluation of the Bench Book's implementation, facilitating timely revisions to address emerging challenges in marital jurisprudence.

Keywords*: kadhis court bench book, marriage, Islamic Sharia, republic of Kenya*

INTRODUCTION

In pre-Islamic Arabia, there exists no written legal code. The people relied on their inherited customs to resolve conflicts and judge matters within their communities. For that, discrimination was rampant, and tribal loyalty led them to support their relatives, regardless of whether they were right or wrong. Additionally, their responses in seeking revenge were often excessive. But with the advent of Islam, Allah commanded His Prophet (pbuh) not only to convey the message but also to arbitrate disputes. Hence, Allah (*SWT*) declares:

فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ... ﴿٦٥﴾

"But no! By your Lord, they will not truly believe until they accept you, O Prophet, as a judge in their disputes".[1]

(Surah al-Nisaa', 4: 65)

In another verse, Allah instructs him to judge according to what Islam has revealed:

وَأَنِ ٱحْكُم بَيْنَهُم بِمَآ أَنزَلَ ٱللَّهُ ...﴿٤٩﴾

"O Prophet, judge between them by what Allah has revealed"[2]

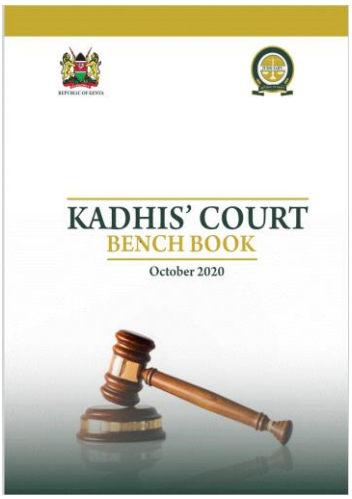
(Surah al-Ma'idah, 5: 49)

1 Surah al-Nisaa': 65
2 Surah al-Ma'idah: 49

The Prophet Mohammad (pbuh) settled in Medina, where he took on the role of settling disputes and issuing fatwas, guiding people on how to implement the revealed rulings. He (pbuh) combined the arms of government (judicial, legislative, and executive powers in his leadership). In cases not explicitly addressed by scripture, he exercised ijtihad (diligent independent judgment). Regarding this, the Prophet Muhammad (pbuh) said:

> قال رسول الله ﷺ: "إنما أنا بشر، وإنكم تختصمون إلي، ولعل بعضكم أن يكون ألحن بحجته من بعض، فأقضي له بنحو ما أسمع ، فمن قضيت له بحق أخيه فإنما أقطع له قطعة من النار [3]
>
> *"You bring your disputes to me, but I am only human. Some of you may be more skilled in argument than others, and I may judge based on what I hear. If I rule in favor of one against his brother's right, I am giving him a piece of fire".*

The Prophet Mohammad (pbuh) served as the first point of reference for resolving disputes in Medina, whether these disputes involved Muslims or people of other faiths, such as Jews and Christians. His judgments were based on the Constitution of Medina, which he himself enacted. The constitution explicitly stated: "If any incident or quarrel arises among the people of this document, which could lead to corruption, its resolution must be referred to Allah (*SWT*) and the Messenger of Allah (pbuh)." [4] Furthermore, the Prophet Muhammad (pbuh) during his government appointed several of his companions to hold the position of Qadhi (judge) in various regions. For example, he sent Mu'adh ibn Jabal to be the Qadhi of Yemen. Mu'adh narrated that when the Messenger of God sent him to Yemen, he asked him how he



[3] Malik ibn Anass, *Muwatta Imam Malik*, (1st edn, Emirates: Muasasat Al-Zaid Al-Nahyanī, 2004), 1040, Hadith No: 2662

[4] Mohammad bin Jarir Al-Tabari, *Tārīkh al-Rusul wa al-Mulūk,* (In Arabic) [The History of the Prophets and Kings] Vol 2 (2nd edn, Beirut: Dar Al-Turath 1387), 395

would judge when a case arose. Mu'adh replied that he would judge in accordance with the Book of God. The Prophet then asked what he would do if he could not find guidance in Al-Qur'an, and Mu'adh responded that he would follow the Sunnah of God's Messenger. The Prophet asked what he would do if he could not find guidance in the Sunnah, and Mu'adh replied that he would use his best judgment (*ijtihad*) and spare no effort. The Messenger of God then tapped him on the chest and said, "Praise be to God who has guided the Messenger's envoy to something that pleases the Messenger of God."[5] The Islamic judiciary holds great significance in society, serving as the protector of the constitution and the guarantor of people's rights to fair judgment. Courts perform multiple functions, including delivering justice, interpreting laws, ensuring fairness in legislation, protecting rights, enforcing decisions and judgments, and conducting judicial inquiries. Therefore, Islam emphasizes the principles of justice and equity for all. By adhering to these principles, the Islamic judiciary fosters trust, integrity, and social harmony.

Islamic legislation has evolved through successive stages, beginning with its revelation and continuing to the present era. This evolution has included both official and individual initiatives to codify Islamic law and establish institutions dedicated to Islamic jurisprudence. Furthermore, advancements in technology have facilitated the creation of numerous legal and educational institutions, further promoting the development of jurisprudence and reinforcing the Islamic judiciary's role in ensuring justice and fairness in society. In this regard, the Kenya *Kadhi* Court adopts the Bench Book as a guiding tool, serving as a quick reference for *kadhis* and enhancing access to justice within the *Kadhi* courts. The bench book provides easy access to authoritative information on substantive matters relating to Muslim personal law applicable in the *Kadhi* courts.[6] The October 2020 edition contains nine chapters and covers 898 Clauses. It addresses topics such as the sources of Islamic law, evidence in Islamic law, marriage, divorce, paternity and filiation, guardianship, custody of children, maintenance and parental authority, inheritance, wills, trusts, and gifts. The *Kadhi Court Bench Book* was developed through the collaboration of various individuals and institutions, including *Kadhi*

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5 Sulayman ibn al-Ash'ath as-Sijistan, *Sunan Abi Dawud*, Vol 5, (1st edn, Beirut: Dar Al-Risalah Al-Ilmiyah, 2009), 444, Hadith No: 3592.

6 Republic of Kenya, *Kadhis Court Bench Book October 2020*, Official Website: <https://www.studocu.com/row/ document/umma-university/criminal-law/kadhis-court-bench-book/61916213> retrieved 10/October/2024.

courts, the Judicial Training Institute (JTI), the International Development Law Organization (IDLO), and other judicial officers, legal practitioners, and stakeholders who participated in information gathering and validation. The development of the *Kadhi Court Bench Book* follows the judiciary's observation of contradictions in verdicts arising from differing opinions among the Madhhabs, such as *Hanafi, Maliki, Shafi'i,* and *Hanbali.* A notable example is the issue of triple divorce (Talāq), pronounced in a single instance. The majority of Muslim jurists have ruled that triple divorce in one pronunciation counts as three separate divorces.[7] However, scholars like Ibn Taymiyyah and Ibn al-Qayyim have argued that such a divorce should be considered as a single, revocable divorce.[8] Meanwhile, the Zāhirī scholars view triple divorce in one pronunciation as an innovation (bid'ah) and believe it holds no legal validity.[9] So, the *Kadhi Court Bench Book* was developed to harmonize judicial rulings by addressing inconsistencies arising from differing Madhhab interpretations. It aims to provide a standardized reference to ensure consistency in verdicts on issues like triple divorce, where scholars hold varying opinions.

Based on the above subject, the objective of this study is to critically evaluate the *Kadhis Court Bench Book*, specifically the section on marriage, from an Islamic Sharia perspective. Enhancing the legal framework governing marriage can contribute to reducing marital disputes and lowering divorce rates. The study will assess the comprehensiveness, accuracy, and applicability of the Bench Book in addressing key aspects of marriage in Islamic law, including the nature of marriage, essentials of marriage, marriage contract, conditions for validity of marriage, enforcement of lawful conditions of marriage, capacity to contract marriage, *Khitbah* (betrothal), solemnizing of marriage, venue of solemnizing marriage, celebration of the marriage, specification of dower, permanently prohibited marriages, temporary prohibited marriages, illicit privacy, valid, invalid and voidable marriages, rights and obligation of marriage partners, matrimonial discord and qualification of the *Hakam*. Additionally, it will identify any gaps or inconsistencies with classical and contemporary *Sharia* views, with the goal of recommending improvements to ensure that the Bench Book effectively serves the needs of the *Kadhis* courts and promotes justice in accordance with Islamic principles. The

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7 Wahbah Al-Zuhaylī, *Al-Fiqh Al-Islamī Waadilatuh*, Vol 9, (4th edn, Syria: Dār Al-Fikr, n.d), 6927.

8 Abdulrahman bin Mohammad Al-Jazair, *Al-Fiqh alā Al-Madhāhib Al-Arbaʿ*, Vol 4, (2nd edn, Beirut: Dār Al-Kutub Al-Ilmiyyah, 2003), 304.

9 Al-Zuhaylī, Al-Fiqh Al-Islamī Waadilatuh, Vol 9, 6927.

study seeks to answer the following research question: To what extent does the *Kadhis Court Bench Book* on marriage aligns with the principles of Islamic Sharia as outlined in classical and contemporary Fiqh school of thoughts? Having established the research question, he hypothesis of this study is presented as follows: The *Kadhis Court Bench Book*, in its section on marriage, largely aligns with the principles of Islamic Sharia. However, certain areas may exhibit gaps or inconsistencies when compared to classical and contemporary Islamic jurisprudence, which could impact its effectiveness in ensuring justice within the *Kadhis* courts. Assessing the *Kadhis Court Bench Book* from a *Sharia* perspective is important for several key reasons: The primary objective of Islamic law is to uphold justice and fairness. By evaluating the *Bench Book* from a *Sharia* perspective, it can be determined whether the rulings and procedures outlined promote equity and protect the rights of all parties involved, especially in sensitive matters like marriage, which affect family structures and social cohesion.

In addition, evaluation of *Kadhis Court Bench Book* helps identifies gaps, ambiguities, or inconsistencies within the *Bench Book*. Addressing these issues can lead to a better functionality within the *Kadhis* courts, ensuring that the rulings are clear, precise, and in line with the Islamic teachings, ultimately leading to more efficient judicial processes. Finally, this article is divided into four sections. The first section provides an overview of the *Kadhi's* Court system, including its legal framework, jurisdiction, and functions. The second section outlines the methodology, while the third section presents an evaluation of the *Kadhi's Court Bench Book*, a comparative analysis with classical Islamic texts, and an assessment of the strengths and weaknesses of the Bench Book. The final section concludes the article and offers conclusions and recommendations.

LITERATURE REVIEW

The establishment of the *Kadhis* Court in the Republic of Kenya dates back to the arrival of Islam in East Africa.[10] The region became a melting pot of indigenous peoples and migrants from the Arabian Peninsula and other

[10] Al-Maqrizī, who passed away in 845 AH (9th century CE), is reported to have met the Kadhi of Lamu, Muhammad bin Ishaq. In his book *Ḍurār Al-Uquod Al-Farīda fī Tarājim Al-Ayan Al-Mufīdah*, Al-Maqrizī notes that the Kadhi of Lamu had come to perform Hajj in Mecca. Al-Maqrizī recounts that he tested the *Kadhi's* knowledge of Shāfi'ī doctrines, particularly on inheritance and worship jurisprudence, using *Al-Ḥawī* as a reference.

areas, leading to a population largely adhering to Islam. several Islamic emirates were formed along the East African coast, such as the Emirate of *Mogadishu*, *Merca*, *Barawa*, and *Kismayo* (in Somalia); the Emirate of *Lamu*, *Malindi*, and *Mombasa* (in Kenya); and the Emirate of *Kilwa*, *Bamba*, and *Zanzibar* (in Tanzania).[11] Through these interactions, the local populations embraced Islam, and an Arab-Islamic culture emerged, spreading across the entire East African coast. This cultural influence was exemplified by the development of the Swahili language, which fused African and Islamic civilizations in its vocabulary and literature, and is now considered one of the richest African literary traditions. Due to disputes that arose among these communities, Sharia judicial courts were established, with most judges following the *Shafi'i* school of thought.[12] The court system continued to function through the colonial period and after independence, remaining in place up to the adoption of the new constitution in 2010.

Ibn Battuta (1154 AD),[13] the famous Moroccan scholar and explorer, traveled to the Swahili Coast and spent a night in the city of Mombasa. He recorded that the people there were *Shafi'i* Muslims, characterized by their religious devotion, trustworthiness, and righteousness. Additionally, he noted that their well-crafted mosques were made of wood.[14] The *Shafi'i* school of thought, introduced to East Africa from southern Arabia and Abyssinia, became the official school for all Islamic judicial courts

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[11] Ibrahim Shadad, Imarat wa Sultanat Islamiyah Mansiyah fi Sharq Ifriqiyah, Official Website: <https://www.ethio monitor.net/ 9996/#:~:text=واسسوا%20امارات%20وسلطنات%20أسلامية%20ضمن,وجزيرة%20كيلوا%20كسوانى%20وجزيرة%20المافيا%20> retrieved 15/October/2024.

[12] Mohammad Abdallah Al-Naqirah, *Intishar Al-Islām Fī Afrika wa Munadhahat Al-Arab Al-Gharb lahū*, (n.d, n.p), 63.

[13] The account of Ibn Battuta (d. 779 AH), who lived during the 8th century AH (between 725 AH and 756 AH), provides evidence of the prominence of Shāfi'ī jurisprudence in Kenya's coastal areas. In his travelogue, he wrote: "Then I took to the sea from the city of Kenya, traveling to the coastal lands, heading toward Mogadishu and Kilwa. We reached the island of Mombasa, a large island located a two-day journey by sea from the mainland. It has no farmland, and its trees are bananas, lemons, and citrons. They have a fruit called *jumūn*, which resembles the olive, with a similar seed, but it is much sweeter. Most of their food consists of bananas and fish, and they follow the Shafi'i school of thought. They are people of religion, righteousness, and chastity, and their mosques are made of wood, beautifully crafted.

[14] J. Spencer Trimingham, *Islam in East Africa*, (Oxford University Press, 1964): 7.

established along the East African coast. This was due to the fact that the majority of the population in these regions were – and still are – followers of Imam Shafi'i's teachings, (may God have mercy on him).[15]

Historically, the Islamic judiciary was significantly impacted during the Portuguese occupation (1498 AD - 1740 AD), when many Islamic cities were burned, and numerous judges and sultans were executed in *Lamu* and the neighboring islands. The wars between the local populations and the Portuguese further disrupted the judicial system. However, the situation soon reverted to its former state, and Islamic courts flourished during the Omani reign, which lasted for approximately three centuries afterward.[16] In 1832, *Sultan Sayyid Said* bin *Sultan*[17] of Muscat relocated his capital from Oman to the island of Zanzibar, establishing it as an independent Arab state, with its territory extending along the East African coast to *Wanga* and *Kipini* (in present-day Kenya). The Sultan personally appointed the *Kadhis* (judges).

In *Zanzibar*, *Kadhis* were drawn from both the *Sunni* and *Ibadhi* schools of thought. However, in specific locations such as *Lamu* and *Mombasa*, only two *Kadhis* were appointed, and they came from prominent local families – the *Maawi* family in *Lamu* and the *Mazrui* family in *Mombasa*.[18] It is noteworthy that in 1895, *Hamid bin Thuwaini Al Busaidi*[19] ceded the administration of the Kenyan coastal strip, extending ten miles known as the "Ten-Mile Coastal Strip Agreement."[20] Under the agreement, the strip would come under British administration in exchange for Britain's

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15 Mohammad Sheikh Alio, "Mahakim Al-Shari' fi Jumhuriyah Kenya wa Al-Tahadiyat alati Tuwajihuha Majalat," *Qirat Al-Ifriqiyyah* 15 no. 1 (2013): 7

16 Alio, Mahakima Al-Shari' fi Jumhuriyah Kenya, 7.

17 Saʿīd bin Sulṭān, Swahilī: Saïd bin Sultani) (5 June 1791 – 19 October 1856) was Sultan of Muscat and Oman, the fifth ruler of the Busaid dynasty from 1804 to 4 June 1856. His rule began after a period of conflict and internecine rivalry of succession that followed the death of his father, Sultan bin Ahmad, in November 1804. He is often referred to as the Lion of Oman, as one of the greatest Omani sultans.

18 Mwenda Mukuthuria, "Islam and development of Kiswahili," *Journal of Pan African Studies* 8 no. 2 (2009): 40.

19 Sayyid Hamad bin Thuwaini Al-Busaidi (c. 1857 – 25 August 1896) was the fifth Sultan of Zanzibar. He ruled Zanzibar from 5 March 1893 to 25 August 1896.

20 Justin Willis and George Gona, "Pwani C Kenya? Memory, Documents and Secessionist Politics in Coastal," *Oxford University Press* 112 no. 445 (2012): 3.

commitment to uphold *Kadhis* Court as it existed before colonialism, ensure freedom of religious practices, protect property rights, and other conditions. The Sultan retained full legal sovereignty over the territories he had ceded administratively to Britain, and Britain agreed to these terms.[21]

After the official declaration, the British colonizers established a civil court in Zanzibar to handle cases involving British subjects in the region. Meanwhile, the Sharia Court continued its judicial work, resulting in a dual legal system.[22] The British sought to unify the judiciary, but it proved difficult to apply both systems effectively in resolving disputes brought before the courts. This conflict extended along Kenya's coastal strip, within a ten-mile radius, as the Sharia Court had full jurisdiction to hear all cases, whether criminal or civil. However, Muslims living beyond the ten-mile strip were subject to Islamic law only in personal matters such as marriage, divorce, and inheritance.[23]

As a result, British colonialism struggled at times to differentiate between the colony and the protectorate (the Kenya coast), leading to conflicting laws and instances of injustice. This situation persisted until 1931, when a significant change occurred in the Sharia Court's role—it was stripped of its authority to consider all types of cases, and its jurisdiction was limited solely to personal status matters, namely marriage, divorce, and inheritance.[24] When the coastal region came under British control in 1895, it negatively impacted the interests of the Arabs, Swahili, and Asians living on the Kenyan coastal strip. These movements and calls for independence, culminating in the Lancaster Conference, which aimed to annex part of the coast to Kenya. The conference was attended by Mr. Dungan Sindi, a representative of the British government, Sultan Abdullah bin Khalifa, Jomo Kenyatta, and others. The key provisions of this treaty are as follows:

> *"The free exercise of any creed or religion will at all times be safe guarded and, in particular, his highness present subjects*

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21 Kevin Odimbe Wanyonyi, The Kadhis Court in Kenya, Master of Science in Development Studies, Lund University, Master diss., (2016): 13-14.

22 Abdulkadir Hashim, "Shaping of the Sharia courts: British policies on transforming the kadhi courts in colonial Zanzibar," *A journal of African studies* 38 no.3 (2012): 13-14.

23 Kuria Mwangi, *The Application and Development of Sharia in Kenya, 1895-1990*, National seminar on contemporary Islam in Kenya, 1995 Mewa, Signal Press Limited, 254.

24 Kuria Mwangi, 254.

> *who are of the Muslim faith and their descendants will at all times be ensured of complete freedom of worship and the preservation of their own religious buildings and institutions. The jurisdiction of Chief Kadhis will at all times be preserved and will be extended to the determination of questions of Muslim law relating to personal status in the proceedings in which all parties profess the Muslim religion. Administrative officers in predominantly Muslim areas should, so far as is reasonably practicable, themselves be Muslims. In view of the importance of the teaching of Arabic to the maintenance of the Muslim religion, Muslim Children will so far as in reasonably practicable be taught Arabic and for this purpose the present grant in-aid to Muslim primary schools now established in the coast region will be maintained"*[25]

This arrangement involved the Sultan relinquishing his sovereignty over the coastal strip to the newly independent government of Kenya. In a letter of response from the Prime Minister of Zanzibar to the Prime Minister of the independent Kenyan government, Jomo Kenyatta, Sultan Jamshed bin Abdullah Al-Busaidi agreed to the terms, making the exchange of letters an official agreement between the Sultan and the government of Kenya in 1963. Jomo Kenyatta confirmed this in his final letter to the Sultan.[26]

As part of this agreement, the independent Kenyan government upheld the operation of the *Kadhi* Courts, maintaining their jurisdiction over the same cases as under British rule-marriage, divorce, and inheritance-applicable to Muslim parties who opted for *Sharia* law in these specific matters. Later, Prime Minister Mzee Jomo Kenyatta informed the United Nations of his government's intention to review pre-independence charters and treaties, with the possibility of confirming, repealing, or amending them. He also pledged to notify the relevant parties, ensuring that the agreements related to the establishment of the *Sharia* Court were taken into account. Kenya's first constitution, enacted in 1963 after independence,

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[25] Kenya Coastal Strip Agreement (8 October 1963), Official Website: https://www.cvce.eu/ content/ publication/2015/10/13/b261f2a3-d7e8-4eb0-9e49-d0160813b492/publishable_en.pdf> retrieved 10/ December/2024.

[26] Manswab Mahsen Abdulrahman, Quḍāt al-Mazāri'a Qabl Istiqlāl Jamhuriyat Keenya wa-ba'd, Proceedings of International Conference on Reformation and Renewal in the light of Prof. Ali Mazrui's Legacy and the Future of Reforms in the Muslim World (Khartoum: International University of Africa, Centre for research and African Studies, February 2019), 126.

formally recognized the Sharia Court under Article 179 (1) to (5), which outlined the structure and jurisdiction of the court:[27]

> *"(1) There shall be a Chief Kadhi and such number, not being less than three, of other Kadhis as may be prescribed by Parliament. (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless—(a) He professes the Muslim religion; and (b) He possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a court of a Kadhi. (3) Without prejudice to the generality of section 178 (1) of this Constitution and subject to the provisions of subsection (4) of this section, there shall be such subordinate courts held by Kadhis (in this Chapter referred to as "courts of a Kadhi") as Parliament may establish and each court of a Kadhi shall, subject to the provisions of this Constitution, have such jurisdiction and powers as may be conferred on it by any law. (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi - and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a court of a Kadhi having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed: Provided that no part of the former Protectorate shall be outside the jurisdiction of some courts of a Kadhi. (5) The jurisdiction of a court of a Kadhi shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion"*

Since independence, successive governments have continually supported the Kadhis courts for Muslims, ensuring the payment of salaries for both judges and clerks. Initially, there were only three judges, but by 1976, this number had grown to eight, and currently, they have outnumbered, there are 36 judges serving across the country.[28] On May 24,

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[27] Kenya Constitution of Kenya, 1963, Kadhis Court 179 (1) to (5), Official Website: <http://kenyalaw .org/kl/fileadmin /pdfdownloads/1963_Constitution.pdf> retrieved 10/October/2024.

[28] Kadhis court, *list of Kadhis in Kenya*, Official Website: <https://judiciary.go.ke/kadhis-courts/> retrieved 10/October/2024.

2010, three judges ruled that the inclusion of Kadhi courts in the current Constitution was illegal and discriminator. [29] However, the new Constitution of Kenya, approved by referendum on August 4, 2010, officially established the Kadhi court system, which operates as subordinate courts, as shown below.

> *"170. (1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament. (2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless the person— (a) professes the Muslim religion; and (b) possesses such knowledge of the Muslim law applicable to any sects of Muslims as qualifies the person, in the opinion of the Judicial Service Commission, to hold a Kadhi's court. (3) Parliament shall establish Kadhis' courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5). (4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being fewer than three in number) as may be prescribed under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within Kenya. (5) The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts."* [30]

Although the new Constitution of Kenya has established the legitimacy of the Kadhi Court, it faces several issues, which are as follows: Arbitration before the Kadhi Court is not mandatory, as the Kenyan Constitution does not require parties to resort to the Kadhis Court to resolve their disputes unless both parties agree to it. Moreover, parties to a dispute have the right to file a lawsuit in a magistrate court regarding Muslim family law matters. This is evident from Article 170, paragraph

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[29] Daily Nation, *Kadhis Courts Illegal, Judges rules*, Official Website: <https://nation.africa/kenya/news/ kadhi-courts-illegal-judges-rule-635048> retrieved 10/October/2024.

[30] Laws of Kenya, *The constitution of Kenya*, Kadhis Court 177 (1) to (5) Official Website: <https://kenyalaw.org/kl/fileadmin/pdfdownloads/TheConstitutionOfKenya.pdf > 80-81 retrieved 10/October/2024.

(c), which states: "and submit to the jurisdiction of the *Kadhis'* courts."[31] In addition, the *Kadhis* do not apply the principle of *res judicata*.[32] This principle implies that once a judgment becomes final, it serves as a conclusive legal presumption of the validity of the decision, and no evidence contradicting it is accepted.[33] This is because a final judgment is considered valid due to the procedural guarantees provided by law. If, for the sake of argument, we allow each disputing party to repeatedly file the same case after a final judgment has been issued, it is unlikely that the judgment would ever satisfy them. This scenario is impractical, and it would undermine the respect and status of the judiciary in society, as the courts would no longer have the final say after all procedures and appeals have been exhausted in the pursuit of justice.

Furthermore, it is well known that refiling the case after a significant amount of time could create conflicts in judgments, which would ultimately erode public confidence and trust in the courts.[34] Furthermore, the Kenyan Constitution states: "A person shall not be qualified to be appointed to hold or act in the office of *Kadhi* unless the person…" According to the Kenyan Constitution, there is no legal prohibition against women holding the position of judge, and there has been discussion on this matter. The former Chief Justice, Willy Mutunga, proposed employing women in the *Kadhis* Court, but this proposal was met with opposition from some Muslim activists.[35] The issue of appeal is another concern. When a preliminary ruling is issued by the *Kadhi* Court, the aggrieved party has the right to appeal the case to the Supreme Court for reconsideration. The High court has the authority to confirm, cancel, or modify the preliminary ruling. The role of the High court is limited to reviewing the case and re-evaluating the evidence. At this stage, the role of the *Kadhi* judge is limited to serving as an assessor, offering their opinion

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31 The constitution of Kenya, 81.

32 Kenya Law, Bihija Ali Sempa & Hassan Ali Sempa v Bakari Mohamed Motte (Civil Appeal 18 of 2013) [2014] KEHC 2174 (KLR) (27 October 2014 (Ruling) Official Website: <https://new. Kenya law.org/akn/ke/judgment/kehc/2014/2174/eng@2014-10-27> retrieved 10/October/2024.

33 Abdulkadir Al-Sanhuri, *Al-Wajīz Fī Sharh Al-Kanūn Al-Madānī*, (1st edn, Beirut: Dār Al-Nahdha, 1996), 630.

34 Ahmad Nashat, *Risālat Al-Ithbat*, (7th edn, Cairo: Dār Al-Fikr, n.d), 206.

35 Tito Kunyuk, The Female Kadhi Controversy, Official Website: < https://www.theelephant.info/analysis /2021/ 11/12/the-female-kadhis-controversy/> retrieved 10/October/2024.

on the facts of the case but not participating in the final decision. Furthermore, it is not required for a High Court judge to be knowledgeable about the provisions of Islamic Sharia. Finally, the jurisdiction of the *Kadhi's* Court remains unclear due to the ambiguity of Article 170 of the Constitution. This article addresses the subject-matter jurisdiction of the Kadhis court, but the legislator's intent in including terms such as marriage, divorce, or inheritance is not very clear-whether these terms were meant to be exhaustive or simply examples. The act was not explained in the accompanying explanatory memorandum. The Muslim family law includes dowry, engagement, guardianship and custody, alimony, lineage, divorce, *khul'*, annulment, gifts, wills, custody, maintenance, inheritance, and others, that are not explicitly addressed in the constitution. This creates confusion regarding the scope of the court's jurisdiction. For example, the Children's Court was established alongside the Children's Act of 1981, which grants it authority over custody matters. This raises issues of legal conflict between the Children's court and the Kadhis court.[36]

METHODOLOGY

The study will employ a qualitative research approach to evaluate the *Kadhis Court Bench Book* from an Islamic *Sharia* perspective, specifically focusing on the section concerning marriage. The methodology will include the following key steps: (i) Document Analysis: The *Kadhis Court Bench Book* (October 2020 edition) will be the main document analyzed, with particular attention to the marriage section. Furthermore, Classical and contemporary Islamic legal texts (such as *Fiqh* manuals) will be reviewed to provide a comparative analysis. These will include works from the four major Sunni schools of thoughts (Hanafi, Maliki, Shafi'i, and Hanbali), along with modern scholarly contributions addressing Islamic marriage jurisprudence. Finally, Relevant provisions and guidelines from the Bench Book will be identified and compared with *Sharia* principles on marriage, including marriage contracts, dowry (*Mahr*), spousal rights and duties, and dispute resolution mechanisms. (ii) Comparative Analysis: A detailed comparative analysis will be conducted between the contents of the *Bench Book* and the rulings of Islamic *Sharia* on marriage. Each aspect of the marriage section (such as marriage contracts, divorce procedures, inheritance matters related to marriage, and maintenance) will be cross-

[36] JNO Advocates, *Kadhis lack jurisdiction on Child Maintenance*, Official Website: <https://jnoadvocates.co.ke/kadhis-lack-jurisdiction -on-child-maintenance/> retrieved 10/October/2024.

checked with Islamic jurisprudence to assess conformity or divergence. In Addition, the analysis will focus on identifying any inconsistencies, gaps, or misinterpretations of Islamic law within the *Bench Book*. These areas will be highlighted to determine where the Bench Book may require adjustments or further elaboration. (iii) Case Study Review: A review of selected marriage-related cases adjudicated in Kadhi courts using the *Bench Book* will be conducted to assess its practical application. These cases will be analyzed to determine how closely the rulings adhere to Sharia law and whether the *Bench Book* provided adequate guidance in achieving Sharia-compliant decisions. This step will help identify any issues that may arise in the practical use of the *Bench Book* and suggest improvements based on observed case outcomes. (iv) Data Interpretation: The findings from the document analysis, comparative analysis, interviews, and case study reviews will be synthesized to form a comprehensive understanding of the *Kadhis Court Bench Book's* strengths and limitations from a Sharia perspective. Based on the evaluation, recommendations for improving the Bench Book to suitably align with Islamic *Sharia* will be proposed. These recommendations will focus on enhancing clarity, accuracy, and practical applications in the *Kadhi* Courts.

DISCUSSION

The Kadhi Court Bench Book was issued in October 2020. It consists of nine chapters, 45 Acts, and 898 clauses across 199 pages. The foreword was written by Mr. Justice David Maraga, the pioneer and former Chief Justice of the Republic of Kenya and President of the Supreme Court under the 2010 constitution, and it was acknowledged by Hon. Mr. Justice Kathurima M'Inoti, the Director of the Judicial Training Institute. Additionally, a technical committee of 10 members finalized the Kadhi Court Bench Book. The book covers the historical background of the Kadhi courts, their objectives, jurisdictions, institutional framework, sources of Islamic law, procedural aspects of Islamic law, and the rules of evidence in Islamic law. The marriage section is covered in Chapter Four and consists of twenty acts as follows: (1) the nature of marriage, (2) the essentials of marriage, (3) the marriage contract, (4) conditions for the validity of marriage, (5) enforcement of lawful conditions of marriage, (6) capacity to contract marriage, (7) *Khitbah* (betrothal), (8) solemnization of marriage, (9) the place of solemnization, (10) the celebration of marriage, (11) specification of dower, (12) permanently prohibited marriages, (13) temporarily prohibited marriages, (14) illicit privacy, (15) valid, invalid, and voidable marriages, (16) the rights and obligations within marriage,

(17) matrimonial discord, (18) cases of matrimonial discord, (19) remedies for matrimonial property, and (20) the qualifications of the *Hakam* (arbitrator).

In terms of structure, the Bench Book lacks proper organization in its structure, particularly in some sections where the content does not progress logically from basic principles to more complex legal matters. For instance, *the Kadhis Court Bench Book* begins by discussing the rules related to marriage, which is unusual because Khitbah (betrothal) typically precedes marriage. Moreover, there is repetitions in the information presented, as the issue of divorce is addressed in both clause 246 and clause 293. Similarly, the conditions for the validity of marriage are repeated in clauses 223 and 276. Finally, several essential rules are missing from the Kadhi's Court Bench Book, such as the competence of the parties (Kufu'), agency in marriage, and matters concerning matrimonial property. These are crucial aspects that warrant attention.

On the other hand, the division of content is generally logical. *The Bench Book* employs well-placed headings and subheadings, making it easy to navigate through sections such as the nature of marriage, the essentials of marriage, and the marriage contract. However, the writing style is somewhat unconventional, as it relies heavily on references from the Qur'an, Hadith, and statements from Muslim jurists. This makes the book more extensive than necessary, where much of the information could be condensed into illustrative notes, providing examples or case studies to clarify complex rulings and assist *Kadhis* in making informed decisions.[37]

In addition, the Bench Book uses endnotes for referencing, but these are not included at the end of the book, making it difficult to quickly find or trace relevant information. While the book includes a bibliography, some essential details such as volume numbers, editions, places of publication, and years of publication are missing. Finally, the language is clear and accessible for the target audience (*Kadhis* and legal professionals), and the guidelines and legal procedures are straightforward and easy to follow.

The Kadhis Court Bench Book adheres to the principles of Islamic family law in several significant ways: (i) The Bench Book is grounded in

[37] University professors and legal scholars play a crucial role in interpreting and clarifying personal law through independent scholarly works. Their contributions help provide deeper insights and practical guidance on the application of these laws. A notable example of such legal frameworks is the Muslim Personal Law Act of 1991 for Sudan, among others, which scholars analyze to ensure a better understanding and implementation of its provisions.

classical Islamic jurisprudence, integrating principles from the Qur'an and Hadith, which are the foundational texts of Islamic family law. This ensures that the legal framework aligns with the essential teachings of Islam. (ii) It highlights the sanctity of marriage by detailing the legal requirements and responsibilities related to marital relationships. This encompasses discussions on the marriage contract, the rights and duties of spouses, and the significance of mutual consent—key elements of Islamic family law. (iii) The Bench Book covers several aspects for example dowry and maintenance among others. This reflects Islamic principles by stressing the importance of formal engagement and the associated rights and responsibilities. (vi) It provides judicial discretion for applying Islamic principles to individual cases, demonstrating the Islamic focus on fairness and justice. This flexibility allows *Kadhis* to adapt the law to specific situations while remaining true to core Islamic values.

Based on the precedence, there some areas where the *Kadhi's Court Bench Book* differs from or inadequately addresses core Sharia principles. A notable example is the inclusion of jurists from all Madhhabs (Hanafi, Malik, Shafi'i and Hanbali) on the technical committee, yet not giving precedence to the Shafi'i Madhhab, which is predominant and practical in East Africa, including Kenya.[38] This has caused confusion among members of the society. For instance, regarding the marriage contract, the *Kadhi's Court Bench Book* states in Chapter Four, under marriage contracts (Clause 221, page 68), that "Marriage can be concluded by any wording that indicates the same meaning as Zawāj or Nikāh and that it is not restricted to them." This contradicts the Shafi'i Madhhab, which holds that a marriage can only be concluded using the words "*Nikah*" or "*Zawāj*".[39] Since these words are explicitly endorsed in the Qur'an, it is essential to adhere to them out of worship, as marriage is a path to acts of worship. The remembrances and expressions used in worship are derived from Sharia, emphasizing the importance of following the prescribed language.

[38] In Kenya, the Shāfi'ī school of thought is widely prioritized in Islamic legal matters, particularly in the jurisprudence of worship and transactions. Many Muslims adhere to the Shāfi'ī Madhhab, performing Qunut in the Fajr prayer and teaching classical Shāfi'ī texts such as *Safinat al-Najat*, among others. This tradition is especially strong among the Swahili and Somali communities, where the Shāfi'ī Madhhab has been historically predominant. See, Madhoun, M. (2007). Shāfi'ī Jurisprudence and its Practice in the East African Coast.

[39] Yahya bin Sharaf an-Nawāwī, *al-Minḥāj*, Vol 3, (1st ed, Cairo: Dār Ihya, n.d), 216. Ibrahim bin Alī al-Fairuzabadī, al-Muhadhab, Vol 2, (1st ed, Cairo: Issa al-Bābī, n.d), 41.

The *Kadhis Court Bench Book* was based on less widely recognized Madhhabs. For instance, the Bench Book states in clause 233 that "the capacity to contract a marriage is attained once a person reaches the age of puberty." This opinion is supported by Ibn Shubrumah among others,[40] although the majority of Muslim jurists permit the marriage of minors.[41] The majority of Muslim jurists have cited various pieces of evidence from the Qur'an, Sunnah, traditions, and scholarly consensus, the most significant of which are the following: Allah (*SWT*) says,

وَٱلَّٰٓـِٔي يَئِسۡنَ مِنَ ٱلۡمَحِيضِ مِن نِّسَآئِكُمۡ إِنِ ٱرۡتَبۡتُمۡ فَعِدَّتُهُنَّ ثَلَٰثَةُ أَشۡهُرٖ وَٱلَّٰٓـِٔي لَمۡ يَحِضۡنَۚ وَأُوْلَٰتُ ٱلۡأَحۡمَالِ أَجَلُهُنَّ أَن يَضَعۡنَ حَمۡلَهُنَّۚ وَمَن يَتَّقِ ٱللَّهَ يَجۡعَل لَّهُۥ مِنۡ أَمۡرِهِۦ يُسۡرٗا ﴿٤﴾

"A And those of your women who have despaired of menstruation, if you are in doubt, their waiting period is three months, and also for those who have not menstruated. And for those who are pregnant, their term is until they give birth. And whoever fears Allah – He will make for him ease in his matter"[42]

(Surah Talaq, 65: 4)

The evidence in this verse suggests that the divorce of a minor who has not yet menstruated is valid, and since divorce only occurs in a valid marriage, the verse implies the permissibility of marrying a minor.[43] Additionally, Aisha (may Allah be pleased with her) reported that,

عَنْ عَائِشَةَ ـ رضى الله عنها ـ أَنَّ النَّبِيَّ صلى الله عليه وسلم "تَزَوَّجَهَا وَهْىَ بِنْتُ سِتِّ سِنِينَ، وَأُدْخِلَتْ عَلَيْهِ وَهْىَ بِنْتُ تِسْعٍ، وَمَكَثَتْ عِنْدَهُ تِسْعًا

[40] Shamsudin Al-Sarakhsī, *Al-Mabsūt*, Vol 4 (1st edn, Beirūt: Dār Al-Marifa, 1993), 212.

[41] Abū Al-Ḥassan Alī bin Khālaf, *Sharḥ Ṣaḥīḥ Al-Bukharī*, Vol 7 (1st edn, Saudi: Maktab Al-Rushd, 2003), 274.

[42] Surah Talaq: 4.

[43] Moḥammad bin Alī Al-Shawkānī, *Fath Al-Qadīr*, Vol 5 (1st edn, Beirūt: Dār Ibn Kathīr, 1993), 292.

> *"The Messenger of Allah (pbuh) married me when I was six years old, and consummated the marriage with me when I was nine years old"*[44]

Furthermore, several scholars, including Al-Kasani,[45] Al-Marwazi,[46] and Al-Jawahir,[47] among others, have reported a consensus on the permissibility of a father marrying off his young daughter. A point to note, the kadhis court bench book acknowledges puberty as the legal age for marriage. In this respect, puberty is subjected to hereditary and non-hereditary (external factors). Hence, it could be attained early or at later stage according to bio-physical factors. Juristically, marriage can be contracted prior to puberty (minor) or post puberty. Therefore, there is contradiction in kadhis court bench book where the constitution focuses on marital consent/contract at 18 years while the bench book focus on puberty which is subjective to internal and external factors and perhaps could occur early or at a later stage.

The *Kadhi's Court Bench Book* fails to sufficiently cover some fundamental Sharia principles in certain sections. A notable example can be found in the conditions of *Sighah* (offer and acceptance) under Act 216, page 67. Several important conditions were omitted, including: (i) There should be no significant delay between the offer (*Ijab*) and acceptance (*Qabul*) that could imply a rejection.[48] (ii) There must be consistency between the offer and acceptance, particularly when foreign languages or expressions are used to avoid any disparity. (iii) The offer and acceptance must align.[49] If one party says, "I will marry you to my daughter Souad," and the suitor responds with, "I accept the marriage of Fatima", then the contract is rendered invalid in such a case. (v) Both parties involved in the contract must be fully competent at the time of agreement. If one party becomes mentally incapacitated or faints during the process, the contract is

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44 Mohammad bin Ismail Al-Bukhary, *Ṣaḥīḥ Al-Bukharī,* Vol 7 (1st edn, Saudi: Maktab Al-Ma'ārif, 1998), 7, Hadith No: 5158.

45 Abubakar bin Mas'ud Al-Kasānī, *Badai' Al-sana' fī Tartib al-Sharā',* Vol 3, (1st edn, Pakistan: Maktab Al-Ḥabibiyyah, 1409), 376.

46 Mohammad Nassir Al-Maruzi, *Ikhtilaf Al-Ulama,* (1st edn, Saudi: Dār 'Alim Al-Kutūb, 1405), 125.

47 Moḥammad bin Ḥassan Al-Jawāhir, *Nawādir Al-Fuqaha,* (1st edn, Tunis: Dār Al-'Illm, 1414), 83.

48 Yahya bin Sharaf an-Nawāwī, *al-Majmuʿ Sharḥ al-Muhadhab*, Vol 9, (Saudi: Maktab al-Irshad, n.d), 144.

49 Jalal al-dīn Moḥammad bin Aḥmad Al-Mahalā, *Kanzu al-Raghibina Sharḥ Minhāj at-Twalibina*, Vol 2, (Saudi: Dār al-Minhāj, 2013), 144.

rendered void.[50] (iv) The Sigha should not be conditional, such as saying, "I will marry you when the sun rises." (v) The formula used should not be temporary, for example, "I will marry you for a period of time" or "until so-and-so returns from his travels."[51]

The *Kadhi's Court Bench Book* incorporates various schools of thoughts (madhahib), including Hanafi, Maliki and Hanbali that sometimes lead to conflicting interpretations of Sharia. For example, regarding interfaith marriages, Chapter Four, under "Marriage of Different Religions" (Clause 271, page 74), states that "A Muslim man is permitted to marry a Kitabiyyah." Muslim scholars held varying opinions regarding the marriage of *Ahl al-Kitāb* (Christians and Jews) but the most prominent is marriage of *Ahl al-Kitāb* is prohibited based on the following facts that the verse from al-Baqarah (2:221) abrogates the verse from Surat al-Maidah.[52] Furthermore, they support their opinion with the following Hadith, Whenever Ibn 'Umar was asked about marrying a Christian lady or a Jewess, he would say: "Allah has made it unlawful for the believers to marry ladies who ascribe partners in worship to Allah, and I do not know of a greater thing, as regards to ascribing partners in worship, etc. to Allah SWT, than that a lady should say that Jesus is her Lord although he is just one of Allah's SWT slaves."[53] In addition, Muslim jurists have stated that the wisdom in permitting a Muslim man to marry a woman from the People of the Book (*Ahl al-Kitab*) lies in the hope that she may be inclined towards his religion. However, what is observed in Kenya seemingly partially convert to Islam, and afterwards many women, upon marital separation, they revert to Christianity.[54] Finally, the *Kadhis' Court Bench Book* contradicts the Constitution of Kenya 2010, which restricts the jurisdiction of Kadhis' Courts to marriages involving Muslim couples or those professing the Islamic faith, and not to those involving couples of blended religious backgrounds.

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50 Muwafaqdin Ibn Qudama, *al-Mughnī*, Vol 7, (Oman: Matba' al-Sulṭaniyyah, 1374), 432.

51 Manswab Mahsen Abdulrahman, *Muslim Family Law and Practice: A Practical Guide to the Laws of Marriage and Dissolution of Marriage*, (1st edn, Uganda: Islamic University in Uganda, 2024), 31.

52 Abdallah Moḥammad Al-Qurtubī, *al-Jami'li Aḥkām al-Qur'an*, Vol 3, (Cairo: Dār al-Kutub al-Misriyyah, 1964), 68.

53 Al-Qurtubī, al-Jami'li Aḥkām, 67.

54 Personal interview with Sheikh Abdulatwif Ibrahim, Mombasa, on November 1, 2024.

Another example of incorporating various schools of thought is the matter of dowry payments, as clearly stated in the bench book, clause 247; page 68 "Dower is not a payment for the contract of marriage but rather an effect of it and a mark of respect to the wife." Muslim jurists hold differing views on the nature of dowry, seeing it as a gift exchanged for something of value. Therefore, they diverge in their definitions of dowry. The Hanafi School defines it as "the money owed to the wife in exchange for her remaining with him, akin to maintenance."[55] Malik, however, defines it as "the amount committed to the fiancée to preserve her chastity."[56] Shafi'i scholars see it as "what is necessitated by marriage, intercourse, or the relinquishment of the right to intercourse by force,"[57] while the Hanbali School describes it as "the compensation inherent in marriage or its equivalents."[58] In conclusion, there is a divergence among Muslim jurists regarding the reality of dowry—some consider it a compensatory requirement for marriage, while others see it as a benevolent gift prescribed by the wise Lawgiver. These differing views have implications for maintenance obligations. According to one perspective, if a wife declines sexual engagement, she forfeits her entitlement to maintenance. Conversely, the Hanafi School reasons that maintenance is grounded in *ihtibas* (complete submission); since the wife is committed to her husband and restricted from doing anything else, the husband is responsible for covering all her expenses.[59] Furthermore, the opinions diverge on who should furnish the matrimonial home: Malik contends that this duty falls on the wife due to her receipt of the dowry, while the Hanafi view assigns this responsibility to the husband, considering the dowry a gift solely owned by the wife.[60]

Another example of incorporating various schools of thought is the matter of a pregnant woman whose husband has passed away, as clearly stated in the bench book, clause 266; page 73 "However if the widow is

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55 Moḥammad bin Sahl Al-Sarakhsī, *Al-Mabsūt*, Vol 5, (1st edn, Beirūt: Dār Al-Ma'arifa, 1989), 62-63.

56 Moḥammad bin Aḥmad Al-Aleish, *Minah Al-Jalili ala Mukhtaṣār Al-Khalīlī*, Vol 3 (1st edn, Beirūt: Dār Al-Fikr, 1984), 415

57 Mohammad Khatīb ash-Shirbīn, *Al-Iqna' fi Hal Alfaz 'Abi Shuja'*, Vol 4, (1st edn, Beirūt: Dār Al-Fikr, 1995), 366.

58 Manṣur bin Yūnus Idris Al-Bahūtī, *Kashāf Al-Qana',* Vol 5, (1st edn, Beirūt: Dār Al-Fikr, 1982), 142.

59 Ibid., Manswab, 96.

60 Ibrahim Al-Aqib Ahmad Jalal Dīn, *Aḥwal Shakhsiyah*, (1st edn, Sudan: Sudan Open University 2006), 97.

pregnant delivery shall forthwith terminate the waiting period." Notably, Muslim jurists are divided on this matter into two groups: The majority of Muslim jurists opine that the waiting period ends immediately after she gives birth when her husband passes away. They support this opinion based on the following proofs: Allah (SWT) says, "And for those who are pregnant, their term is until they give birth."[61] This verse is general and includes a divorced pregnant woman whose husband has died, as God has set her waiting period to be the birth of a child. The correct version as inferred is: "the Hadith of Subia' Al-Aslamī, who was married to Said bin Khawla and passed away after the farewell pilgrimage. One day, Abu Sanabili noticed that Subia' looked more beautiful and asked her why she had made herself beautiful, suggesting that she might be seeking a new husband. He reminded her that she was not entitled to remarry until she had completed her waiting period of four months and ten days. Following this critic, Subia' approached Prophet Muhammad (pbuh) the next day and inquired about the waiting period. The Prophet Mohammad (pbuh) replied, 'It is permissible for you to marry once you have given birth." [62] Furthermore, they said the majority of Muslim jurists agree that the waiting period for a pregnant woman whose husband has passed away is the act of giving birth. Finally, the act of delivering is a sufficient sign of the purity of the uterus. Ali ibn Abi Talib and Ibn Abbas (RA) said that the waiting period for pregnancy is a long duration of time between giving birth and four months and ten days. [63] They support this opinion based on the following proofs: Allah (SWT) says,

وَٱلَّذِينَ يُتَوَفَّوْنَ مِنكُمْ وَيَذَرُونَ أَزْوَٰجًا يَتَرَبَّصْنَ بِأَنفُسِهِنَّ أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا ۖ ...﴿٢٣٤﴾

"The wives of men who have died must observe a waiting period of four months and ten days"[64]

(Surah al-Baqarah, 2: 234)

The above verse indicates that a woman whose husband has passed away must observe a waiting period of four months and ten days. However,

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61 QS. at-Talaq [65]: 4.

62 Malik bin Anas, *Muwaṭṭa*, Vol 4, (1st edn, Emirates: Muasasat Zaid bin Sultan Al-Nahayan Lilamal Al-Kheiriyah wa Al-Insaniyah, 2004), 848, Hadith No: 2188.

63 Mohammad Sidiq Khan, *Al-Rawḍa Al-Nadiyyah*, Vol 2, (1st edn, Saudi: Dār ibn Qaim, 2003), 294.

64 Surah al-Baqarah: 234.

if she is pregnant and gives birth before the end of this prescribed period, she will not remain in waiting until the end of that period. If the waiting period ends and she has not yet given birth, she must wait until the child is born. If she is accustomed to the latter of the two durations, then she has followed the guidance of both verses. Combining the two verses is preferable to prioritizing one over the other.[65]

In certain areas, the guidelines provided in the *Kadhi's Court Bench Book* do not entirely conform to fundamental Sharia principles, which could affect the credibility of rulings derived from it. For example, clause 243 on page 68 states that "there is no preferred location for the solemnization of marriage..." This clause appears to conflict with a well-known Hadith, which emphasizes that:

عَنْ عَائِشَةَ قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَعْلِنُوا هَذَا النِّكَاحَ وَاجْعَلُوهُ فِي الْمَسَاجِدِ وَاضْرِبُوا عَلَيْهِ بِالدُّفُوفِ

"Make marriage publicly known, solemnize it in the mosques, and play tambourines in honor of it"[66]

Furthermore, a Jew once asked the Prophet Muhammad (pbuh) about the best and worst places. The Prophet then referred the question to Angel Gabriel. Later, Gabriel responded, saying, "O Muhammad, I approached my Lord closer than ever before." When the Prophet asked Gabriel about what he had learned, Gabriel replied, "Between my Lord and me, there were seventy thousand veils of light, and

فَقَالَ: شَرُّ الْبِقَاعِ أَسْوَاقُهَا وَخَيْرُ الْبِقَاعِ مساجدها

"He said that the worst places are the markets, while the best places are the mosques"[67]

The Permanent Committee for Scholarly Research and Ifta also emphasizes conducting marriages in mosques, a position supported by several scholars, including Sheikh Abdul Aziz bin Baz, Sheikh Abdul Razzaq Afifi, Sheikh Abdullah bin Ghadyan, and Sheikh Abdullah bin Qu'ud, as recorded in Fatawa al-Lajnah al-Da'imah (18/110). To enlighten

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65 Ibn Qudāmah, *Al-Mughnī,* Vol 7, (1st edn, Riyadh: Dār 'Alim al-Kitāb, 1986), 473.

66 Mohammad ibn Isa al-Tirmidhī, *Sunan al-Tirmidhī,* Vol 2, (1st edn, Beirūt: Dār Al-Gharb, 1998), 390, Hadith No: 1089.

67 Ahmed Bin Al Hussein Al-Bayhaqī, *Sunan Al-Kubrā,* Vol 3, (3rd edn, Beirūt: Dār Al-Kutūb Al-'Ilmiyyah, 2003), 92, Hadith No: 4984.

more, Marriage in Islam is a form of Ibadah (worship) and is considered to fulfill half of one's faith. While acts of worship can sometimes be performed privately, marriage's significant status and social impact call for public acknowledgment. Islamic law requires the presence of at least two adult male witnesses to validate the marriage, supporting transparency and preventing potential disputes over the marriage's legitimacy. The terms of the marriage, including the agreed-upon mahr (dowry), are documented in a marriage contract. The mosque's imam, or marriage registrar, may officiate and ensure that the marriage contract aligns with Islamic principles. Typically, a khutbah (sermon) is given by the preacher, highlighting the spiritual and moral responsibilities within marriage and serving as a reminder of the values and ethics upheld in an Islamic union. Conducting the marriage in a mosque allows the community to witness and celebrate the union, symbolizing communal support for the couple. As a place of blessing, the mosque helps reduce the legal or moral violations often associated with other venues, such as prohibited mixing of opposite gender, smoking, music, and other activities discouraged by Sharia. Finally, Sheikh Abdullah Al-Tayyar stated in his book *Al-Fiqh Al-Muyassar* that the majority of jurists recommended conducting the marriage contract in the mosque for its blessings and to publicize it.[68]

The extent of that are ambiguity or unclarity *Kadhi's Court Bench Book*, which leads to inconsistencies in judicial decision-making, is the instance in, Clause 224 which states, "However, the minor will have the option (marital annulment) upon reaching the age of majority," referring ambiguously to the "age of puberty." Additionally, in Clause 233, the term tamyīz is incorrectly translated as "the age of puberty", while the correct term should be "the age of discernment". Clause 234 mentions a rule associated with revocable divorce, stating that a husband may remarry his wife as long as she is in her waiting period, but it omits to include without new dowry and a new marriage contract. Furthermore, in Clause 231, the Bench Book includes types of conditions that are uncommon among Muslim jurists,[69] while omitting standard categories such as conditions for contracting (*In'iqad*), conditions for validity (*Sihhah*), conditions for effectiveness (*Nafaz*), and conditions for permissibility (*Jawaz*). Typographical errors also appear, as in Clause 246, where no clear

[68] Abdallah bin Mohammad Tayar, Al-Fiqh Al-Muyasar, Vol 11, (1st edn, Riyadh: Madar Al-Watan, 2011), 43

[69] The Kadhi's Court Bench Book outlines the conditions of marriage, including accurate identification of the parties, mutual consent, the bride's guardian's permission, and the presence of two witnesses.

distinction is made between "*Mahr Muʿajjal*" (prompt dower) and deferred dower. Lastly, the Bench Book does not address the waiting period for women who have passed the age of menstruation or for those who have not yet begun menstruating, making it challenging for users to interpret and apply these guidelines effectively.

The *Kadhi's Court Bench Book* has closed an eye on certain issues, which may lead to varied interpretations and applications of Islamic family law based on each *Kadhi's* individual understanding and experience. This inconsistency can produce differing judgments in similar cases, compromising fairness and predictability in the judicial process. For example, *Kadhis Court Bench Book* does not elaborate the consequences of breaking a betrothal for gift whereby there are several opinions which exist as follows:(a) The Hanafi school of thought holds that gifts take the same ruling as a gift, and they are returned to their owner unless they fall under one of the seven impediments to returning a gift, which are: (i) Increase in value. (ii) Death of the donor or donee. (iii) Compensation for the gift. (iv) The gifted property leaving the possession of the donee. (v) An existing marriage between the donor and the donee at the time of the gift. (vi) a Mahram relationship between the donor and the donee. (vii) Destruction of the gifted property in the hands of the donee. [70] (b) The Malikis distinguished between cases in which withdrawal was initiated by a man or a woman. If the withdrawal is initiated by a man, he forfeits any right to recover his gifts, whether they are in existence or have been spent. This is because he offered the gifts with the condition of completing the marriage, and since he failed to fulfill this condition, he is not entitled to reclaim any of his gifts. On the other hand, if the withdrawal is initiated by the woman, the suitor has the right to reclaim all the gifts he provided, whether they are still available or have been consumed. This ensures that the suitor does not suffer from both rejection and financial loss simultaneously.[71] (c) Shafi'i holds two opinions on this matter: (i) According to the first opinion, he has the right to reclaim the gift, whether it was food, drink, candy, or jewelry, regardless of whether the withdrawal was initiated by him or her. This is because he only spent it with the intention of marrying her. (ii) In the second opinion, it aligns with the view of Imam Malik and applies when

[70] Moḥammad bin Amin Umar Abdulaziz, *al-Uqūd al-Ḍuriyyah fī Tanqih al-Fatāwa al-Hamidiya*, Vol 1, (2nd edn, Egypt: Matbah al-Maymaniyyah, 1310), 29.

[71] Moḥammad Urufah, *Hashiyah al-Dasouq alā Sharh al-Kabīr*, (1st edn, Beirūt: Dār al-Kutūb al-Illmiyyah 1417), 11.

the withdrawal is initiated by a woman.[72] (d) Ibn Hanbal holds that a gift will be subject to the same rules as a gift that is not permissible to be returned after receipt.[73]

In conclusion, some provisions in the Bench Book pose challenges for implementation. For example, Clause 224 states that "Marriage through a guardian by a minor is may be annulled upon petitioning the court when the child attains the age of majority". This clause may create loopholes allowing for the termination of marriage once the minor reaches puberty, which undermines the protective intent of Islamic marital law. Additionally, minors may endure emotional turmoil and live with resentment and dissatisfaction, which could worsen their psychological distress if they must wait until reaching puberty to seek annulment. On the other hand, a marriage cannot take place without the presence of a guardian. This stipulation exists because, regardless of a woman's level of maturity, she is not authorized to enter into marriage independently. The marriage contract must involve two male parties: one being the husband and the other acting as the wife's guardian. The Messenger of Allah (pbuh) said: "The marriage of a woman who marries without the consent of her guardians is void. (He repeated these words) three times."[74] Guardianship was legislated in the context of marriage contracts due to the belief that men, being more experienced with the circumstances of men, are considered more suited to handle the intricacies of such contracts compared to women. This belief stemmed from the notion that men, through their frequent interactions and involvement in various aspects of life, have a better grasp of these matters. On the other hand, women are often perceived as less experienced and potentially more susceptible to influence and deception. As a result, the practice of having a guardian to oversee a woman's marriage contract was established with the intention of safeguarding her interests.[75]

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[72] Ibn Ḥajar Ḥaitham, *al-Fatāwa al-Fiqhiyyah al-Kubrā*, Vol 4, (1st edn, Beirūt: Dār al-Kutūb al-Illmiyyah 1403), 94.

[73] Muwafaqdin Abdallah bin Qudama, *Al-Mughnī*, Vol 5, (1st edn Cairo: Dār al-Hijra, 1412), 380

[74] Aḥmad bin Moḥammad bin Ḥanbali, *Musnad Aḥmad bin Moḥammad bin Ḥanbalī*, Vol 6, (1st edn, Beirūt: Alim al-Kutūb, 1998), p. 165, Hadith No: 25840.

[75] Ibrahim Al-Aqib, Ahwal Shakhsiyyah, 71

CONCLUSION

The Kadhis Court of Kenya dates back to the arrival of Islam in East Africa although during that days they did not codify the Muslim family law, later on, they enacted Muslim family law after they observed that there were contradictions in verdicts resulting from different opinions of school of thoughts (Hanafi, Malik, Shafi'i and Hanbali) so the main objective of this Bench Book is to provide a quick reference and guide for *Kadhis* to promote access to justice. Additionally, it aims to provide ease accessibility in a clear and simple manner authoritative references on substantive matters related to Muslim personal law applicable in the Kadhis' courts. Despite its utility in harmonizing judicial practices, some inconsistencies and ambiguities remain, largely due to its partial reliance on interpretations from less prominent Madhhabs, which occasionally causes deviations from fundamental Sharia principles. This study underscores the importance of refining the Bench Book to ensure better alignment with foundational Sharia principles. Establishing a continuous monitoring framework for its implementation is recommended, allowing for timely updates that address evolving issues in marital jurisprudence. Such a framework will help the judiciary enhance consistency, transparency, and fairness in its handling of marital cases.

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