

# A Comparative Analysis of Child Custody and Access Rights After Divorce or Separation in Kenya and England

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*ABSTRACT This study examines the laws and practices surrounding child custody and access rights in Kenya and England following divorce or separation. Its goal is to identify similarities and differences in both countries' legal frameworks and social practices governing these issues. The research methodology employed for this study includes reviewing existing literature such as statutes, case law, and academic papers. The study has discovered that while there are some similarities in the legal frameworks governing child custody and access rights in Kenya and England, there are also significant differences in the legal principles and social practices that inform these frameworks. Various factors, including cultural norms, socioeconomic status, and the role of the family in society, influence these differences. In conclusion, the study suggests that further research is necessary to understand how these differences affect parents and children in both jurisdictions. Additionally, it recommends developing more effective legal and social policies to support families after divorce or separation.*

KEYWORDS *divorce, separation, child's welfare, England, Kenya*

## 1. Introduction

The notion of family has existed for as long as humans have and typically refers to individuals who are related by blood or united through marriage.<sup>1</sup> The significance of marriage in establishing a family cannot be overstated and is particularly integral to family law. In Kenya, marriage is defined as the willing union of a man and a woman, whether in a monogamous or polygamous arrangement. Historically, many cultures have regarded marriage as a lifelong bond, exemplified by the common Judeo-Christian marriage vows that pledge commitment "until death do us part."<sup>2</sup>

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<sup>1</sup> Mary Jo Maynes, and Ann Waltner, "Family History and World History: From Domestication to Biopolitics," in *The Cambridge World History: Volume 1: Introducing World History, to 10,000 BCE*, ed. David Christian (Cambridge: Cambridge University Press, 2015), 208–233.

<sup>2</sup> Gwen J. Broude, *Marriage, Family, and Relationships: A Cross-Cultural Encyclopedia*, Encyclopedias of the Human Experience (Santa Barbara, Calif.: ABC-CLIO, 1994).

In Islam, the Quran recognizes both monogamous and polygamous marriages. The Quran promotes marriage as a means of finding companionship, and moral support, and a means of realizing the duties religion bestows on a person. Surah An-Nisa (4:3) a verse in the Quran, promotes monogamous marriage by directing Muslims to marry just one woman if they think they are not capable of taking care of multiple women; the same verse promotes polygamous marriages and permits Muslims to marry up to four wives with a condition that they must be just and fair to all of them and if they are not capable of doing that, then they should just have one wife, since it is not compulsory for a Muslim to have multiple wives.<sup>3</sup>

Throughout history, marriage has been considered a sacred and lifelong bond involving a man and woman, however, there have been situations where this ideal has not been attainable.<sup>4</sup> Family law has had to adapt to include different grounds and reasons for divorce. Divorce law is a vital part of family law, since it changes the legal status of partners and affects other aspects of family life, such as child custody and marital property contracts/agreements or prenuptial agreements.<sup>5</sup> Society is interested in regulating marriage because it creates rights and obligations for the people involved, which sometimes continue even after the marriage has ended. This article looks at current English and Kenyan laws on divorce, particularly the recognized reasons for divorce, and the difference between the newly introduced reason of irretrievable breakdown and the more traditional fault-based reasons for divorce, it also covers the rights parents have to access their children after the divorce.

Divorce or separation is a complex and emotional process that can be challenging for any couple, regardless of nationality or location. In Kenya and England, divorce and separation proceedings are governed by specific laws and regulations that must be followed. Divorce is the legal dissolution of a marriage, while separation is the legal termination of a civil union.<sup>6</sup> In Kenya, the law that governs divorce and separation is the Marriage Act of 2014 and the Matrimonial Causes Act of 2015.<sup>7</sup> Section 3 of the Act provides for the grounds for divorce, including adultery, cruelty, desertion, and irretrievable marriage breakdown. Divorce or separation involves filing a petition with the court, and the court may then issue a decree nisi (a decree nisi is a preliminary court order that grants a divorce or dissolution of marriage, subject to certain conditions or waiting periods. It is not yet final, but it allows the parties to begin living apart

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<sup>3</sup> Avdullah Robaj, "Marriage According to the Islamic Law (Sharia) and the Secular Law," *Perspectives of Law and Public Administration* 10, no. 2 (2021): 19–24.

<sup>4</sup> Christopher Lasch, "The Suppression of Clandestine Marriage in England: The Marriage Act of 1753," *Salmagundi*, no. 26 (1974): 90–109.

<sup>5</sup> James S. Read, "Marriage and Divorce: A New Look for the Law in Kenya," *East African Law Journal* 5, no. 1 and 2 (1969): 107–40.

<sup>6</sup> Joanna Miles, "'Cohabitants' in the Law of England and Wales: A Brief Introduction," in *Cohabitation and Religious Marriage* (Bristol University Press, 2020), 27–38, <https://bristoluniversitypressdigital.com/display/book/9781529210842/ch003.xml>.

<sup>7</sup> Marriage Act, No. 4 2014. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202014>.

while they wait for the final order).<sup>8</sup> If there are no objections or appeals, the court will issue an absolute decree, which legally ends the marriage.<sup>9</sup> Divorce or separation in Kenya can be particularly challenging due to cultural and societal factors. For example, divorce is still stigmatized in many Kenyan communities, and women face challenges if they initiate it.<sup>10</sup> In addition, child custody and support can be complex issues, especially if there are disagreements between the parents about what is in the child's best interests, however, Article 3 of the UN Convention on the Rights of the Child 1989 provided direction to the courts and decision-makers to always consider the rights of the child and their best interest in the matter of their upkeep.<sup>11</sup>

In England, divorce and separation are governed by the Matrimonial Causes Act of 1973.<sup>12</sup> Section 1(2) of the Act provides for the grounds for divorce, which include adultery, unreasonable behavior, desertion, and separation for at least two years (collectively referred to as fault-based reasons). Divorce involves filing a petition with the court, and the court may then issue a decree nisi. If there are no objections or appeals, the court issues a decree absolute, which legally ends the marriage. Divorce, which is a full and legal termination of marriage, is different from separation, in which parties live apart but are still legally married, however, both cases are emotionally challenging to the parties, and the children involved.<sup>13</sup> Therefore, the courts consider various factors when making decisions about financial settlements, including the length of the marriage, the parties' earning capacity, and the standard of living they enjoyed during the marriage.

Similarly, decisions about child custody and support are made based on the child's best interests, and the courts consider a range of factors, including the child's age, living arrangements, and relationship with each parent.<sup>14</sup> It is

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<sup>8</sup> Mary Welstead, "Divorce in England and Wales: Time for Reform," *Denning Law Journal* 24 (2012): 21–38.

<sup>9</sup> Welstead, "Divorce in England and Wales: Time for Reform," 21–38.

<sup>10</sup> Jessica Penwell Barnett, Eleanor Maticka-Tyndale, and Trócaire Kenya, "Stigma as Social Control: Gender-Based Violence Stigma, Life Chances, and Moral Order in Kenya," *Social Problems* 63, no. 3 (2016): 447–462.

<sup>11</sup> Michael Nyongesa Wabwile, "Child Support Rights in Kenya and in the UN Convention on the Rights of the Child 1989 Kenya," *International Survey of Family Law* 2001 (2001): 267–284.

<sup>12</sup> Matrimonial Causes Act of 1973.

<https://www.legislation.gov.uk/ukpga/1973/18/contents>.

<sup>13</sup> Catherine Fairbairn, "Commons Library Analysis: Divorce, Dissolution and Separation Bill [HL] 2019-21," July 16, 2023, <https://commonslibrary.parliament.uk/research-briefings/cbp-8697/>.&House of Commons Library, "Divorce in England and Wales: An Overview," briefing paper 8375 (London: House of Commons Library, 2021), 2.

<sup>14</sup> Athena D. Mutua, "Gender Equality and Women's Solidarity across Religious, Ethnic, and Class Differences in the Kenyan Constitutional Review Process," *William and Mary Journal of Women and the Law* 13, no. 1 (2006-2007): 1–128.

essential to prioritize the well-being of any children involved and work towards an outcome in their best interests.

Divorce or separation is a complex and emotional experience for any couple, but it becomes even more complicated when children are involved. The question of child custody and access rights becomes critical in these situations. This article compares Kenya's and England's child custody and access rights laws and practices.

## 2. Why compare Kenya and England

English law has had a very significant impact on the development of family laws in Kenya, it began with the advent of colonialization, and it persists to modern times since Kenya was colonized by England and during that time several pieces of legislation were introduced in Kenya. The family law dealing with the rights associated with the child and parties to marriage upon divorce or separation were brought to Kenya by English colonizers.<sup>15</sup> British laws, including the marriage and divorce laws, were among other laws enacted in Kenya during the colonization and were retained after Kenya gained its independence, replacing the customary laws that were in place to govern the social lives of various tribes and communities that called Kenya their homes; the need for consolidation of laws was to bring everyone living in Kenya under the same law.<sup>16</sup> A comparison between Kenya's and England's approach to child custody and access rights following a divorce or separation has been conducted; since Kenya was an English colony. This analysis is vital because the two jurisdictions have differing legal systems and family law approaches that impact such cases' outcomes. By identifying these differences, a better understanding can be gained of how each legal system affects the issue of child custody and access rights.

Due to their diverse cultural and societal norms, child custody and access rights are viewed and enforced differently in Kenya and England. In Kenya, extended family members often play a significant role in child-rearing.<sup>17</sup> On the other hand, individualism is emphasized in England.<sup>18</sup> Cultural differences can impact

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<sup>15</sup> A. N. Allott, "What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950," *Journal of African Law* 28, no. 1/2 (1984): 56–71.

<sup>16</sup> Eugene Cotran, "The Development and Reform of the Law in Kenya," *Journal of African Law* 27, no. 1 (1983): 42–61.

<sup>17</sup> Shelley Clark et al., "Who Helps Single Mothers in Nairobi? The Role of Kin Support," *Journal of Marriage and Family* 79, no. 4 (2017): 1186–1204.

<sup>18</sup> Douglas B. Downey, James W. Ainsworth-Darnell, and Mikaela J. Dufur, "Sex of Parent and Children's Well-Being in Single-Parent Households," *Journal of Marriage and Family* 60, no. 4 (1998): 878–893.

how custody and access cases are resolved.<sup>19</sup> Conducting a comparative analysis helps in identifying these differences.

This approach to child custody and access rights in different jurisdictions offers valuable insights into their strengths and weaknesses, which help lawmakers in making informed decisions in both countries.<sup>20</sup> It also helps policymakers to amend the laws and systems by identifying effective policies and practices in individual jurisdictions. A comparative study of child custody and access rights post-divorce or separation in Kenya and England provides perspectives on how each jurisdiction tackles this crucial matter and how they could learn from each other to enhance their laws.<sup>21</sup>

### 3. Overview of Child Custody and Access Rights

Child custody and access rights are two important legal concepts in the divorce or separation of a couple with children. Child custody refers to the legal right to decide about a child's upbringing, including their education, medical care, and religion.<sup>22</sup> In Kenya, child custody is governed by the Children Act of 2001, while in England matters relating to child custody are governed by the Children Act of 1989.<sup>23</sup> Access rights, on the other hand, refer to the right of a non-custodial parent to spend time with their child. When parents decide to separate or divorce, they must decide on their children's care and upbringing.<sup>24</sup> This can be done through negotiations between the parents or court proceedings, depending on their conflict level. In most cases, it is in the child's best interests for both parents to have a meaningful relationship with them. However, there are cases where one parent may be considered unfit to care for the child or pose a risk to their safety, in which case sole custody may be granted to the other parent.<sup>25</sup>

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<sup>19</sup> H. W. O. Okoth-Ogendo, and S. B. O. Gutto, "The Legal Status of the Child in Kenya's Political Economy," *Columbia Human Rights Law Review* 13, no. 2 (1982 1981): 495–536.

<sup>20</sup> Vianney Sebayiga, "The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in *TSJ v SHSR* (2019) eKLR," SSRN Scholarly Paper (Rochester, NY, February 5, 2022).

<sup>21</sup> Patricia Kameri-Mbote, "Custody and the Rights of Children," n.d.

<sup>22</sup> Okoth-Ogendo, and Gutto, "The Legal Status of the Child in Kenya's Political Economy."

<sup>23</sup> Danaya C. Wright, "The Crisis of Child Custody: A History of the Birth of Family Law in England," *Columbia Journal of Gender and Law* 11, no. 2 (2002): 175–270.

<sup>24</sup> Jo-Ellen Paradise, "The Disparity between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems Note," *St. John's Law Review* 72, no. 2 (1998): 517–580.

<sup>25</sup> Bruce Smyth et al., "Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?," *Law and Contemporary Problems* 77, no. 1 (2014): 109–149.

### **3. 1 The types of custody arrangements that can be made include**

Kenya has embraced Western laws and, in matters dealing with children's rights and parental access to children after divorce or separation,<sup>26</sup> the following are recognized types of custody arrangements in both countries, by the Children Act of 2001 in Kenya and the Children Act of 1989 in England.

#### **3. 1. 1 Sole custody**

Sole custody refers to a custody arrangement where one parent is granted legal and physical custody of the child (to have the child live with him or her), and the other has access rights. The parent with sole custody has the legal right to make all decisions regarding the child's upbringing, such as education, healthcare, religion, and extracurricular activities, without the other parent's input or approval. In this arrangement, the non-custodial parent may have limited or supervised access to the child. In addition, the non-custodial parent may be allowed visitation rights or scheduled times to spend with the child. However, the custodial parent has the final say in all significant child welfare decisions.<sup>27</sup>

Sole custody is usually awarded when one parent is deemed unfit or unable to care for the child. For example, if one parent has a history of drug or alcohol abuse, mental illness, or a criminal record, the court may grant sole custody to the other parent. In addition, in some cases, the court may award sole custody to one parent if the other parent is absent or has abandoned the child.

#### **3. 1. 2 Joint custody**

Joint custody is where both parents share legal custody and decision-making responsibilities. Still, the child may live primarily with one parent, or the parents may have equal time with the child. In this arrangement, parents have the right to participate in all major decisions affecting the child's welfare, such as education, healthcare, religion, and extracurricular activities.<sup>28</sup>

Joint custody can take several forms, including joint legal custody, joint physical custody, or a combination of the two. Joint legal custody means that both parents share the decision-making responsibilities, but the child lives primarily with one parent. Joint physical custody means that the child spends equal time with both parents. In a joint custody arrangement, the child's well-being is the top priority, and both parents must work together to make decisions

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<sup>26</sup> Michael Nyongesa Wabwile, "The Place of English Law in Kenya," *Oxford University Commonwealth Law Journal* 3, no. 1 (2003): 51–80.

<sup>27</sup> Linda Nielsen, "Shared Physical Custody: Does It Benefit Most Children," *Journal of the American Academy of Matrimonial Lawyers* 28, no. 1 (2015-2016): 79–138.

<sup>28</sup> Michael Benjamin, and Howard H. Irving, "Shared Parenting: Critical Review of the Research Literature," *Family and Conciliation Courts Review* 27, no. 2 (1989): 21–36.

that are in the child's best interests. This arrangement is generally preferred when both parents are deemed fit and able to care for the child and are willing to cooperate and communicate effectively.<sup>29</sup>

### **3. 1. 3 Split custody**

This is a custody agreement in which each parent has custody of one or more children rather than sharing joint custody of all children. This arrangement is relatively rare and typically only occurs when there are multiple children, and each parent is better suited to care for different children. For example, if there are two children and one child has a closer bond with one parent, while the other child has a closer bond with the other parent, then the court may award split custody. In this case, each parent has legal and physical custody of one child, and the children may have visitation rights with the other parent. Split custody can be challenging for children, as it can be difficult to be separated from siblings and parents. However, the court may award split custody if it is in the children's best interests.<sup>30</sup>

### **3. 1. 4 Bird's nest custody**

Bird's nest custody is a type of custody arrangement where the child resides in one home, and the parents alternate living with the child while maintaining separate residences. This arrangement provides stability for the child, as they remain in the same home and attend the same school. However, the parents must coordinate their schedules to ensure equal time with the child, which can be challenging. Bird's nest custody is usually utilized when the parents are on good terms and committed to working together for the child's benefit.<sup>31</sup> Bird's nest custody can be a helpful solution for younger children who struggle with constant changes in living situations. However, it can also be expensive since both parents need to maintain multiple homes. Moreover, this arrangement may not be possible if the parents live far away from each other or have logistical difficulties in coordinating schedules.

### **3. 1. 5 Third-party custody**

In cases where neither parent is considered capable of caring for a child or when the child is in danger due to parental abuse or neglect, third-party custody may be granted. This type of custody allows a non-parent to have legal and physical custody of the child. The third-party caregiver can be a grandparent, other

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<sup>29</sup> Benjamin, and Irving, "Shared Parenting," 21–36.

<sup>30</sup> Michael Lanci, "In the Child's Best Interests? Rethinking Consideration of Physical Disability in Child Custody Disputes," *Columbia Law Review* 118, no. 3 (2018): 875–914.

<sup>31</sup> Michael T. Flannery, "Is Bird Nesting in the Best Interest of Children," *SMU Law Review* 57, no. 2 (2004): 295–352.

family members, or a non-relative, like a foster parent. Before granting custody, the court will evaluate the fitness of the caregiver and determine what is in the child's best interest.<sup>32</sup> It can be difficult to adjust when a child is placed in the custody of someone who is not their parent. However, if deemed in the child's best interest, the court may grant third-party custody to ensure the child's safety and well-being. Depending on the situation, the child's parents may be given supervised or limited access to the child.

When deciding about custody, the court considers various factors, including the child's age, their relationship with each parent, the parents' ability to care for the child, and the child's wishes if they are old enough to express them.

<sup>33</sup>Access rights, also called visitation rights, allow a non-custodial parent to spend time with their child. These rights can be established through an agreement between the parents or a court order. Access can include regular visits, holiday time, and communication through phone or video calls. The distance between the parents' homes, the child's age and needs, and safety concerns can impact the access arrangements. Moreover, the court may consider the non-custodial parent's involvement in the child's life before the separation when determining the extent of their access.<sup>34</sup>

Child custody and access rights become crucial legal matters during a divorce or separation. Parents have to prioritize their child's well-being and collaborate to determine what is best for them. If an agreement cannot be reached, the court will decide based on assessing the child's best interests.

#### **4. Child Custody and Access Rights in England**

This section provides an analysis of child custody and access rights in England. It covers relevant laws, legal standards, and court practices regarding custody and access rights. It also discusses the challenges English parents face seeking custody or access to their children following divorce or separation.

The country's laws and legal standards determine divorce, child custody, and access rights in England. The Matrimonial Causes Act 1973 is the governing legislation for divorce in England. Section 1 of the Act outlines the grounds for divorce, including adultery, unreasonable behavior, desertion, two years of separation with the other spouse's consent, or five years' separation without the other spouse's consent. The divorce process typically involves submitting a divorce petition to the court, followed by a period of negotiation or mediation to reach an agreement on issues such as property division, financial support, and

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<sup>32</sup> Elizabeth S. Scott, "Pluralism, Parental Preference, and Child Custody," *California Law Review* 80, no. 3 (1992): 615–672.

<sup>33</sup> Lanci, "In the Child's Best Interests?"

<sup>34</sup> Lisa V. Martin, "Securing Access to Justice for Children," *Harvard Civil Rights-Civil Liberties Law Review* 57, no. 2 (2022): 615–656.



child custody arrangements. A judge may make a ruling if these issues cannot be resolved through negotiation.<sup>35</sup>

Child custody and access in England are regulated by the Children Act 1989. Section 1(1) of this Act states that the child's welfare is the court's top priority. This means that custody and access determinations are made based on the child's best interests rather than the desires of the parents. The court may consider various factors when making these decisions, such as the child's age, health, and educational requirements, as well as each parent's capacity to care for the child's needs.<sup>36</sup> When parents cannot agree regarding custody and access arrangements for their child, section 12 of the Children Act allows the court to appoint a Children and Family Court Advisory and Support Service (CAFCASS) officer. The CAFCASS officer assesses the child's needs and provides recommendations to the court.<sup>37</sup> The CAFCASS officer can assist parents in reaching an agreement regarding custody and visitation arrangements. In situations where one parent has been abusive or violent towards the child or the other parent, the court may order supervised contact or limit access to the child to ensure their safety and welfare.

When determining custody and visitation rights, the court utilizes a set of legal guidelines called the "welfare checklist." This list considers various factors such as the child's physical, emotional, and educational requirements, the potential impact on the child if there are any changes in their situation, and the child's age, gender, and background.<sup>38</sup> When deciding custody and access arrangements for a child, the court considers the "no order" principle. This principle states that the court should only make an order for the child's welfare if necessary. This encourages parents to agree on their own without involving the court.

The family court system in England follows the principle of open justice, which allows the public to attend court proceedings.<sup>39</sup> In situations involving minors, the court has the authority to limit disclosure of the legal proceedings to safeguard the child's confidentiality. Additionally, the court promotes alternative dispute resolution approaches, such as mediation or collaborative law, to reach agreements on custody and visitation arrangements. These

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<sup>35</sup> Herbert Jacob, "Another Look at No-Fault Divorce and the Post-Divorce Finances of Women," *Law & Society Review* 23, no. 1 (1989): 95–115.

<sup>36</sup> Enne Mae Guerrero, "A Necessary Job: Protecting the Rights of Parents with Disabilities in Child Welfare Systems," *Hastings Race and Poverty Law Journal* 18, no. 1 (2021): 91–112.

<sup>37</sup> Allison M. Nichols, "Toward a Child-Centered Approach to Evaluating Claims of Alienation in High-Conflict Custody Disputes," *Michigan Law Review* 112, no. 4 (2014): 663–688.

<sup>38</sup> Andrew Bainham, and Stephen Gilmore, "The English Children and Families Act 2014," *Victoria University of Wellington Law Review* 46, no. 3 (2015): 627–648.

<sup>39</sup> Luigi Lonardo, "The Best Interests of the Child in the Case Law of the Court of Justice of the European Union," *Maastricht Journal of European and Comparative Law* 29, no. 5 (October 2022): 596–614.

approaches are typically less confrontational and concentrate on discovering mutually agreeable solutions.<sup>40</sup>

As discussed above, the Matrimonial Causes Act of 1973, Children Act of 1989, and Family Act of 1996 are some of the laws that regulate divorce, child custody, and access rights in England. The court prioritizes the child's well-being and decides based on their best interests. Additionally, parents are encouraged to utilize alternative dispute resolution methods to agree on custody and access arrangements whenever feasible.

#### **4. 1 Children and Family Court Advisory and Support Service (CAFCASS)**

The Children and Family Court Advisory and Support Service (CAFCASS) is an independent organization in England responsible for providing support and advice to family courts concerning children's welfare.<sup>41</sup>

##### **4. 1. 1 Role of CAFCASS**

CAFCASS was established in 2001 under the Criminal Justice and Court Services Act 2000. Its primary role is to advise family courts on matters relating to children's welfare, including child custody, access rights, and other issues related to the welfare of children involved in family court proceedings. CAFCASS is an independent organization whose officers are not affiliated with any party in a case. Instead, they work closely with the courts, local authorities, and other agencies involved in children's welfare to ensure that the child's best interests are always prioritized.

The primary law governing the functions of CAFCASS is the Children Act 1989. Section 12 of the Act specifies that CAFCASS officers must safeguard and promote the welfare of children involved in family court proceedings. This includes advising the court on matters related to the child's welfare and recommending the best course of action in the child's best interests.<sup>42</sup> In addition to the Children Act, CAFCASS operates under the Family Procedure Rules 2010, which set out the procedures for family court proceedings in England and Wales. Rule 16.4 specifies that CAFCASS officers must prepare a

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<sup>40</sup> Marit Skivenes, "Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?," *Acta Sociologica* 53, no. 4 (2010): 339–353.

<sup>41</sup> Joan Small, "Parents and Children: Welfare, Liberty, and Charter Rights 2005 John and Mary A. Yaremko Programme on Multiculturalism and Human Rights Symposium: Equality and the Family: Decisional Authority," *Journal of Law & Equality* 4, no. 1 (2005): 103–116.

<sup>42</sup> Ann Buchanan, and Victoria Bream, "Do Some Separated Parents Who Cannot Agree Arrangements for Their Children Need a More Therapeutic Rather than Forensic Service Special Issue: Seminar at All Souls College, Oxford: 2 July 2001," *Child and Family Law Quarterly* 13, no. 4 (2001): 353–360.

report for the court in cases involving children, including assessing the child's welfare and recommending any necessary interventions.<sup>43</sup>

In *Re W (Children) [2016] EWCA Civ 113 - Family Law* (Care Proceedings: Child's Wishes), the court considered the importance of having regard to a child's wishes and feelings when making decisions about their welfare.<sup>44</sup> In this case, CAFCASS was instrumental in ensuring that the child's voice was heard and that the court considered their wishes and feelings. Another notable case involving CAFCASS is *Re C (Children)* (Care Proceedings: Assessment of Kinship Carers), in which the court considered the importance of assessing potential kinship carers in care proceedings. In this case, CAFCASS was responsible for assessing potential kinship carers and advising the court on the suitability of each option.<sup>45</sup> CAFCASS prioritizes children's welfare in family court proceedings. Its officers are responsible for providing advice and making recommendations to the court on matters related to children's welfare, and they work closely with other agencies to ensure that the child's best interests are always at the forefront of decision-making.

## 4. 2 Divorce and Separation in Kenya

Divorce or separation in Kenya can be particularly challenging due to cultural and societal factors. In Kenyan culture and the practiced customs among various communities, marriage is not just a union between two individuals but a union between two families, and divorce or separation can have significant social and cultural consequences.<sup>46</sup> I will further explain this statement by citing examples, case laws, and legislation that illustrate the obstacles faced during divorce or separation in Kenya due to cultural and societal influences.

In Kenya, divorce or separation can be difficult due to cultural, religious, and societal differences factors, such as the stigma attached to it. It is often seen as a personal or marital failure when a couple ends their marriage.<sup>47</sup> This belief is widely held in Kenyan society and can have severe repercussions for those involved, especially women. Women who choose to file for divorce are often

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<sup>43</sup> Judith Masson, "Representation of Children in England: Protecting Children in Child Protection Proceedings New Perspectives on Child Protection," *Family Law Quarterly* 34, no. 3 (2000-2001): 467-496.

<sup>44</sup> Felicity Bell, "Meetings between Children's Lawyers and Children Involved in Private Family Law Disputes," *Child and Family Law Quarterly* 28, no. 1 (2016): 5-24.

<sup>45</sup> Stuart Bedston et al., "Data Resource: Children and Family Court Advisory and Support Service (Cafcass) Public Family Law Administrative Records in England," *International Journal of Population Data Science* 5, no. 1 (March 26, 2020).

<sup>46</sup> Marguerite Johnston, "Review of Report of the Kenya Commission on the Law of Marriage and Divorce," *University of Pennsylvania Law Review* 119, no. 6 (1971): 1075-1079.

<sup>47</sup> Elin Henrysson, and Sandra F. Joireman, "On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya," *Law & Society Review* 43, no. 1 (2009): 39-60.

met with stigma and social exclusion from their families and communities, resulting in significant social and economic ramifications.

In Kenya, several tribes customarily emphasize the communal ownership of land and it is taken as the property of the entire community rather than an individual asset.<sup>48</sup> When a couple divorces or separates, the property is usually divided between the two families rather than the individuals involved.<sup>49</sup> This can make it difficult for individuals, particularly women, to retain their property after a divorce or separation. In the case of *S J O vs. J O O [2002] eKLR*,<sup>50</sup> the court acknowledged the obstacles women encounter during divorce or separation proceedings due to cultural and societal influences. The court held that women should be entitled to equal property rights in divorce or separation, regardless of cultural or societal norms. In the case of *YN v MMK (Divorce Cause E010 of 2021) [2023] KEKC 7 (KLR) (23 February 2023) (Judgment)*,<sup>51</sup> the court recognized the stigma associated with divorce in Kenya and its impact on women. The court ruled that seeking a divorce should not result in stigmatization or ostracism for women. They should be treated with dignity and respect.<sup>52</sup>

#### 4. 2. 1 Legislation in Kenya

The 2010 Kenyan Constitution protects women's rights, particularly in cases of divorce or separation due to cultural and societal issues. Article 45(3) of the Constitution ensures that both parties involved in a marriage have equal rights during the marriage, at the time of the marriage, and even after the dissolution of the marriage.<sup>53</sup> In 2013, the Matrimonial Property Act was adopted to acknowledge the difficulties women face during property division in cases of divorce or separation. The Act ensures that both spouses have equal rights to the matrimonial property and recognizes women's significant contributions to acquiring and managing the property.<sup>54</sup>

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<sup>48</sup> Amelia Hopkins, "Law, Land and Identity: Property and Belonging in Colonial Kenya," *SOAS Law Journal* 1, no. 1 (2014): 139–172.

<sup>49</sup> Njeri Kagotho, and Michael G. Vaughn, "Women's Agency in Household Economic Decision Making in Kenya," *International Social Work* 61, no. 6 (2018): 767–780.

<sup>50</sup> "Divorce Cause 39 of 98 - Kenya Law," accessed August 13, 2023, <http://kenyalaw.org/caselaw/cases/view/6255>.

<sup>51</sup> "Divorce Cause E010 of 2021 - Kenya Law," accessed August 13, 2023, <http://kenyalaw.org/caselaw/cases/view/255655/>.

<sup>52</sup> Chinenye Joy Mgbeokwere, "Discriminatory Cultural Practices of Property Rights of African Women despite Legal Framework: A Call for More Proactive Measures," *African Customary and Religious Law Review* 3 (2022): 23–30.

<sup>53</sup> Elizabeth Muli, "Rethinking Access to Justice: Enforcing Women's Rights in Cases of Domestic Violence in Kenya Feature," *East African Journal of Human Rights and Democracy* 2, no. 3 (2004): 222–253.

<sup>54</sup> Winifred Kamau, "Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Custom," *International Journal of Law, Policy and the Family* 23, no. 2 (2009): 133–144.

Getting a divorce or separating in Kenya can be tough, primarily because of cultural and social factors. Divorce is often viewed negatively; splitting up property can be complicated, and people see marriage as joining two families. These factors make it difficult for those seeking divorce or separation in Kenya.<sup>55</sup> According to the Kenya National Bureau of Statistics, the divorce rate has risen to 5.5% from the earlier 4% in 2019.<sup>56</sup> In Kenya, there are ongoing efforts through case laws and legislation to safeguard women's rights and tackle the obstacles those seeking divorce or separation face.

#### 4. 2. 2 Child Custody and Access Rights in Kenya

Child custody and access rights in Kenya are governed by the Children Act No. 8 of 2001, which according to section 5, is a uniform law governing everyone within the country regardless of their religion, race, nationality, or tribe. This law aims to protect children's rights and welfare and outlines custody and access procedures. The child's welfare and best interests are prioritized when determining custody or access. The law recognizes that both parents have equal rights and responsibilities towards their children and that the child has the right to maintain regular contact with both parents. Custody refers to the right to decide about the child's upbringing, education, religion, and health. There are two types of custody under Kenyan law: sole and joint. Under sole custody, one parent has the right to make all decisions about the child's upbringing, while in the case of joint custody, both parents share this responsibility. Access refers to the right of a non-custodial parent to spend time with their child. Section 23 of the Children Act provides that a parent without custody has the right to reasonable access to their child unless it is deemed not in the child's best interests.

When deciding on custody and visitation arrangements, Kenyan courts consider various factors. These may include the child's age, preferences, emotions, the parent's capacity to care for the child's well-being, and any past domestic violence or abuse. One notable case in Kenya concerning child custody and access is the case of *K W M v R N [2015] eKLR*<sup>57</sup>. The court ruled that the well-being and best interests of the child take precedence and that both parents share equal rights and obligations towards their offspring.<sup>58</sup> The court stressed the significance of maintaining consistent communication between the child and both parents unless it is not in the child's best interest. Another critical case is the case of *AG v MAW [2017] eKLR, Jeneby Mawira v Annwhiller Mwende*

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<sup>55</sup> Henrysson, and Joireman, "On the Edge of the Law."

<sup>56</sup> "Number of Homes Headed by Divorcees Rises by 16pc," Nation, January 23, 2023, <https://nation.africa/kenya/news/number-of-homes-headed-by-divorcees-rises-by-16pc-4095180>.

<sup>57</sup> "Civil Appeal 16 of 2015 - Kenya Law," accessed August 13, 2023, <http://kenyalaw.org/caselaw/cases/view/111883>.

<sup>58</sup> Lucyline Nkatha Murungi, "Consolidating Family Law in Kenya Special Issue on Family Law," *European Journal of Law Reform* 17, no. 2 (2015): 317–328.

*Rugendo & another [2017] eKLR.*<sup>59</sup> The court ruled that the right to access is not unlimited and must be weighed against the child's well-being. Consequently, the father's request for access was denied due to his behavior harming the child's welfare.

The Children Act is designed to safeguard children's rights, welfare, and protection. It outlines the custody and access procedures and prioritizes the child's best interests in any decision-making process. Both parents have equal rights and responsibilities towards their children. When deciding on custody and access matters, the court considers several factors, such as the child's age, preferences, and the parent's capacity to provide for their welfare.

In Kenya, divorce can be granted if one of the parties commits adultery, is cruel, deserts their spouse, or if the marriage has irretrievably broken down. According to Section 3 of the Matrimonial Property Act, marriage is a voluntary union between a man and a woman, whether monogamous or polygamous. The High Court of Kenya ruled in the case of **Caroline Atieno Onyango v. Albert Ochieng Onyango (2012)** that if one spouse abandons the matrimonial home for at least three continuous years without justification, this is considered desertion and can be grounds for divorce.<sup>60</sup>

In Kenya, the Children Act provides that the child's best interests shall be paramount in any matter concerning the child. Section 24 of the Act states that the father and mother of a child have equal parental responsibilities and rights. In the case of *FGC v PGN [2021] eKLR*,<sup>61</sup> the Court of Appeal of Kenya held that custody of a child should be awarded to the parent who can provide the best care and protection for the child, considering the child's welfare and best interests. The court also emphasized that the decision should not be based on the parent's gender. In cases where one parent is denied access to the child, the aggrieved parent may seek a court order for access. In the case of *Noordin v Karim [1990] eKLR*,<sup>62</sup> the High Court of Kenya held that a parent has a right to reasonable access to a child unless it is not in the child's best interests. The court noted that the primary consideration in such cases is the child's welfare.<sup>63</sup>

To summarize, various laws and regulations in Kenya govern divorce, child custody, and access rights. The legal system in Kenya acknowledges the significance of safeguarding the child's best interests regarding their welfare. As

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<sup>59</sup> "Civil Appeal 28 of 2016 - Kenya Law," accessed August 13, 2023, <http://kenyalaw.org/caselaw/cases/view/137206>.

<sup>60</sup> Gibson Kamau Kuria, "Christianity and Family Law in Kenya," *East African Law Journal* 12, no. 1 (1976): 33–82.

<sup>61</sup> "Civil Appeal 73 of 2020 - Kenya Law," accessed August 14, 2023, <http://kenyalaw.org/caselaw/cases/view/224154/>.

<sup>62</sup> "Misc Civ Case 58 of 85 - Kenya Law," accessed August 14, 2023, <http://kenyalaw.org/caselaw/cases/view/7650/>.

<sup>63</sup> James Forole Jarso, "Implementing the Children's Rights Agenda in Kenya: Taking Stock of the Progress, Hurdles and Prospects Academy on Human Rights and Humanitarian Law Articles and Essays Analyzing the Rights of Children and International Human Rights Law," *American University International Law Review* 27, no. 3 (2012 2011): 673–718.

a result, individuals need to seek legal advice and representation to ensure their rights are protected.

## **5. Comparative Analysis**

This section aims to examine the child custody and access laws and practices in Kenya and England. It will identify the similarities and differences between the two countries' legal systems, including the standards used to determine custody and access, court procedures, and the obstacles faced by parents seeking custody or access. The legal frameworks for divorce, child custody, and access rights in Kenya and England differ considerably, owing to the differences in the legal systems, cultural norms, and socioeconomic factors.

### **5.1 Divorce Laws and Practices in Kenya and England**

In Kenya, the Marriage Act is the main law that regulates divorce. It allows for both fault-based and no-fault divorce. For fault-based divorce, one party must provide evidence that the other has engaged in adultery, cruelty, or left them for a minimum of three years. However, no-fault divorce can be granted if the marriage has irretrievably broken down, which can be proven by living apart for at least a year or through mutual agreement.<sup>64</sup>

Divorce in England is regulated by the Matrimonial Causes Act of 1973. However, unlike in Kenya, only no-fault divorce is permitted in England. One spouse may file for divorce citing the irretrievable breakdown of the marriage, which can be established by showing that the parties have lived separately for a minimum of two years (if both parties agree to the divorce) or five years (if one party does not consent).<sup>65</sup>

### **5.2 Child Custody and Access Rights Laws and Practices in Kenya and England**

Child custody laws in Kenya are regulated by the Children Act 2001. The Act prioritizes the child's welfare in all custody-related decisions. It also acknowledges joint custody as a principle where both parents share responsibility for the child's upbringing and make decisions together.<sup>66</sup>

Child custody laws in England are guided by the principle of the welfare of the child, as stated in the Children Act 1989. According to the Act, parents have equal parental responsibility for their children, and decisions about their

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<sup>64</sup> Eugene Cotran, "Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?," *Journal of African Law* 40, no. 2 (1996): 194–204.

<sup>65</sup> Madelene De Jong, "A Pragmatic Look at Mediation as an Alternative to Divorce Litigation," *Journal of South African Law* 2010, no. 3 (2010): 515–531.

<sup>66</sup> George (I) Brown, "The Children Act 1989," *Law & Justice - The Christian Law Review* 146 (2001): 57–66.

upbringing should be made jointly. However, in reality, custody is frequently awarded to the primary caregiver, who is often the mother.<sup>67</sup>

In both Kenya and England, non-custodial parents have the right to access their child. However, in Kenya, the court has the power to grant access rights based on their discretion, which may result in either reasonable access or specific access rights. Similarly, in England, access rights are also granted at the court's discretion, with the potential for either reasonable contact or specific contact rights to be ordered.<sup>68</sup>

In Kenya, in the case of *HOO v MGO [2021] eKLR*<sup>69</sup> The principle was established that the child's best interests should be the primary concern in any decision regarding child custody. Based on this principle, the court granted joint custody to the parents as it was deemed to be in the child's best interests. In England, the case of *Re D (Children) [2016] EWCA Civ 89*<sup>70</sup> established that the well-being of the child should be the top priority in any decision regarding child custody and access. In this particular case, the court awarded custody to the father, who was previously the non-custodial parent, as it was deemed to be in the children's best interest.

In Kenya and England, the laws regarding child custody and access rights following a divorce or separation vary greatly. These differences are impacted by a variety of factors, including cultural norms, socioeconomic status, and the family's role within society.

In Kenya, child custody and access rights after divorce or separation are largely influenced by traditional cultural norms and values. The family holds great importance in Kenyan society, and it is typical for extended family members to have a significant role in raising children. Therefore, following a divorce or separation, custody is typically granted to the parent who is seen as more capable of providing for the child, with the expectation that the extended family will also be involved in the child's upbringing.<sup>71</sup> It is uncommon for a father to be granted custody, while in England, the child's best interests are the primary focus for determining child custody and access rights.<sup>72</sup> When determining custody, various factors are considered, such as the child's emotional, physical, and educational needs, as well as each parent's capability to fulfill those requirements. Unlike in Kenya, the family's role in the child's upbringing is not

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<sup>67</sup> Michael Nyongesa Wabwile, "Rights Brought Home: Human Rights in Kenya's Children Act 2001 Kenya," *International Survey of Family Law* 2005 (2005): 393–416.

<sup>68</sup> "Cases," *Law Times Reports: Containing All the Cases Argued and Determined in the House of Lords* 154 (1936): 1–728.; Okoth-Ogendo and Gutto, "The Legal Status of the Child in Kenya's Political Economy."

<sup>69</sup> "Civil Appeal E026 of 2021 - Kenya Law," <http://kenyalaw.org/caselaw/cases/view/220815>.

<sup>70</sup> "Re D (Children) [2016] EWCA Civ 89," accessed August 19, 2023, [https://www.familylaw.co.uk/news\\_and\\_comment/re-d-children-2016-ewca-civ-89](https://www.familylaw.co.uk/news_and_comment/re-d-children-2016-ewca-civ-89).

<sup>71</sup> Wabwile, "Rights Brought Home."

<sup>72</sup> Harold Niman, "Custody, Access and Parental Mobility Rights," *Advocates' Quarterly* 10, no. 1 (1988-1989): 117–126.



so crucial. The spotlight is on the parent's capacity to provide for the child's necessities and establish a favorable relationship with the child.<sup>73</sup>

Both in Kenya and England, the socioeconomic status of parents plays a crucial role in determining child custody and access rights. In Kenya, for instance, wealthier parents may have an edge in custody disputes because they are better equipped to meet the needs of the child.<sup>74</sup> On the other hand, in England, the court takes into account the influence of socioeconomic status on the child's welfare and may grant custody to the parent who can offer a more dependable and safe setting for the child, irrespective of their financial status.<sup>75</sup>

## 6. Conclusion

In conclusion, when it comes to child custody and access rights after divorce, Kenya and England have both similarities and differences in their legal frameworks. Both countries place a high value on the child's well-being, but their approaches may differ. The legal systems in Kenya and England are not the same, and this affects how custody and access rights are determined. In Kenya, customary and Islamic laws significantly impact disputes over child custody; Kenya is a diverse country with over 45 ethnic groups, each having its customs and culture and they determine the social lives of the members of the community regarding marriage, divorce, children's rights and the rights of an unmarried daughter.<sup>76</sup> These customs define the roles and responsibilities of family members, including the right of a parent to have access to the child, and who is to have the custody of the child upon the divorce. Customary laws in most communities in Kenya bestow responsibilities on the relatives of the child to help take care of them if the biological parents are not available and define the way property should be dealt with, which gives a lot of power to the father rather than the mother on dealing with a minor child.<sup>77</sup> In regards to Muslim law, Kenyans who profess the Islamic faith heavily rely on the Quran and the teaching of the prophet Mohamed to govern their private lives, especially on matters dealing with divorce, rights of an unmarried daughter, succession etc .

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<sup>73</sup> Mafuku Matadi, and Desan Iyer, "The Realisation of Children's Survival Rights in South Africa, Kenya and the Democratic Republic of the Congo: A Comparative," *Comparative and International Law Journal of Southern Africa* 52, no. 3 (2019): 352–388.

<sup>74</sup> Amanda Barratt, and Sandra Burman, "Deciding the Best Interests of the Child: An International Perspective on Custody Decision-Making," *South African Law Journal* 118, no. 3 (2001): 556–573.

<sup>75</sup> B. Rwezaura, "The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa Social Issue: Part One: The Best Interests of the Child: Conceptual Issues," *International Journal of Law and the Family* 8, no. 1 (1994): 82–116.

<sup>76</sup> Mgbeokwere, "Discriminatory Cultural Practices of Property Rights of African Women despite Legal Framework."

<sup>77</sup> Richard L. Abel, "A Bibliography of the Customary Laws of Kenya (with Special Reference to the Laws of Wrongs) Bibliography," *African Law Studies* 2 (1969): 1–48.

The Islamic faith promotes the best interest of the child.<sup>78</sup> Conversely, in England, the courts have considerable discretionary powers to decide what is best for the child. This means that when legal matters related to children, such as custody, visitation, or other matters, come before the court, the judges have the authority to make decisions based on their judgement and consideration of various factors, rather than being bound by strict, rigid rules or guidelines.<sup>79</sup>

There is a significant difference between the accessibility of legal aid in Kenya and England. In Kenya, legal aid is limited, but in England, a more comprehensive legal aid system assists low-income individuals in child custody disputes. This ensures that the welfare of children is protected, regardless of their parent's financial circumstances. Despite the differences in the legal systems, both countries have taken significant steps to protect children's rights. However, the comparative analysis demonstrates the need for continuous efforts to enhance both countries' legal frameworks governing child custody and access rights.

To sum up, the well-being of the child should always be the top priority in disputes over custody or visitation. The analysis of similarities and differences between the child custody and access systems in Kenya and England can offer valuable information to enhance the legal frameworks and result in better outcomes for families and children.

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<sup>78</sup> M. A. Vahed, "Should the Question: What Is in a Child's Best Interest Be Judged According to the Child's Own Cultural and Religious Perspectives - The Case of the Muslim Child," *Comparative and International Law Journal of Southern Africa* 32, no. 3 (1999): 364–375.

<sup>79</sup> Wright, "The Crisis of Child Custody".