
*African Grandmothers Tribunal—Seeking Justice at the Frontlines
of the AIDS crisis*

***Kenya:
Wife Inheritance***

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WIFE INHERITANCE

Introduction

Wife inheritance, or levirate marriage, can be generally defined as the practice whereby a brother or male relative of a deceased male inherits the now widow.¹ The origins of this custom were honorable: the intention was to ensure care for a widow and her children.² An inheritor, or levir, could only take responsibility for a widow if he himself had a family and was able to provide the necessities of life.³ Traditionally the widow was also afforded the opportunity to state her wishes regarding the proposed inheritance, as well as select another male from a neighbouring clan.⁴ In practice, wife inheritance is highly problematic, often resulting from a widow's desperation to care for her children. Women who resist inheritance are often shunned by their community, stripped of their land and rendered homeless.⁵ For many widows in this situation there is no other choice than accepting inheritance.

Patriarchy and Wife Inheritance

The enduring patriarchal system in modern Kenya elucidates the tension. Male dominance is clearly present in the practice of wife inheritance as a custom, often underlying the reason that widows accept inheritance. For example, women are often barred from owning or controlling resources (such as land or cattle) which could lead to

¹ Kenda Mutongi, *Worries of the Heart: Widows, Family, and Community in Kenya* (Chicago: University of Chicago Press, 2007) at 66.

² Stephen Buckley, "Wife inheritance spurs AIDS rise in Kenya", *Washington Post Foreign Service* (8 November 1997).

³ *Ibid.*

⁴ Edwins Laban Moogi Gwako, "Widow Inheritance among the Maragoli of Western Kenya" (1998) 54:2 *Journal of Anthropological Research* 173.

⁵ *Supra* note 2.

independence.⁶ While protests to such gender-based discrimination are becoming increasingly apparent, many women are subject to male dominance and are unable to resist the resources that come along with inheritance. In a study of Maragoli widows, those who accepted inheritance listed a desire to comply with custom, as well as economic and resource driven motivations as underlying their decisions.⁷ Many claimed that they had no choice but to accept this custom as they otherwise would be denied access to land or their deceased husband's estate.⁸ Additionally, if a widow does not have a son, unless she is financially independent, she has few alternatives to accepting inheritance, as land is subject to a patrilineal descent system.⁹

It is worth noting that among those who do enter into levirate marriages, a small but meaningful percentage of widows terminate the relationships.¹⁰ Alcoholic and abusive inheritors, financial misappropriation, lack of parenting assistance, and STD infection are cited as the main reasons for termination.¹¹

Among those who successfully resist inheritance there is a strong sense of gender equality such that their rejection of levirate relationships is also a rejection of the patriarchal system.¹² These women rebuff the notion underlying widow inheritance: that they need assistance from their deceased husband's male relatives.

Not surprisingly, widows who complied with inheritance had little to no money, low incomes and insignificant amounts of land, while those who resisted were employed in well-paying jobs and were financially secure.¹³ Education was also a distinguishing

⁶ *Surpa* note 4 at 178.

⁷ *Ibid* at 182.

⁸ *Ibid*.

⁹ *Ibid* at 184.

¹⁰ *Ibid* at 185.

¹¹ *Ibid* at 186.

¹² *Ibid* at 188.

¹³ *Ibid* at 181.

factor with the former typically having low levels of formal schooling and the latter being well educated.¹⁴

AIDS

The HIV/AIDS epidemic has been most severe in sub-Saharan Africa with a disproportionate number of those affected being women.¹⁵ Within Kenya the HIV rates among widows are exceptionally high and increasing. Estimated rates among Kenyan widows in 2003 were 30.2%, while in 2009 they had jumped to an alarming 43.1%.¹⁶

The role of widow inheritance plays a significant role in the transmission of HIV. Many widows are infected with HIV and are left behind by husbands who have succumbed to the disease.¹⁷ Though traditionally entering into a sexual relationship with an inherited widow was shunned, this is no longer the case.¹⁸ While some levirate relationships are companionship based, the majority of widows enter into a sexual relationship with their respective inheritors.¹⁹ If the widow is HIV positive and enters into a sexual relationship with her inheritor, she is at high risk of passing along the virus not only to her levir but also his other wife (or wives), amplifying the number of individuals exposed to probable transmission of the virus. This cycle is worsened by the denial often exhibited surrounding HIV/AIDS. Widows and levirs sometimes refuse to acknowledge that AIDS was the cause of the husband's death, attributing it to other causes such as malaria or witchcraft.²⁰

¹⁴ *Ibid.*

¹⁵ Agot E Kawango et al, "Widow Inheritance and HIV Prevalence in Bondo District, Kenya: Baseline Results from a Prospective Cohort Study" (2010) 5:11 PLoS ONE.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Whitney George, "Kenya: Wife Inheritance Spreads AIDS" (1997) 27:11 *Off Our Backs* 3.

¹⁹ *Supra* note 15.

²⁰ *Supra* note 2.

Though a strong contingent of the population uphold this custom, fear of contracting HIV has resulted in many relatives of the deceased to shy away from inheriting a widow. This has led desperate widows to seek out non-relative inheritors. This demand for willing levirs has resulted in a trend towards men inheriting multiple widows.²¹ Widows inherited into these types of sexual relationships exhibit a higher rate of HIV infection, which is attributed to a higher instance of “casual sex partners and sex in exchange for help since the death of their husbands”.²²

The marked importance placed on children in Kenyan society also plays a contributing role linking widow inheritance to the spread of HIV/AIDS. Children, especially sons, grant a woman a degree of status in her community. Sonless and childless widows cite a desire to procreate with her inheritor as a motivating factor for accepting inheritance but also engaging in a sexual relationship with the inheritor.²³

Additional risk factors for contracting and transmitting HIV that have been attributed to widow inheritance are: inheritors typically have more than one sexual partner, the low rate of condom use, and, finally, widows typically comply with inheritance out of desperation and, thus, exhibit a willingness to engage in riskier sexual practices.²⁴

Amongst widows who are able to successfully resist inheritance, avoiding the contraction of HIV (or, if already HIV positive, preventing the further transmission of the disease) is a determining factor.²⁵

Kenyan Legal System

²¹ *Supra* note 15.

²² *Ibid.*

²³ *Supra* note 4.

²⁴ *Supra* note 15.

²⁵ *Supra* note 4.

The current Kenyan legal system is one of legal pluralism. The judicial system consists of multiple sources of family law jurisprudence stemming from statutory law, Hindu, Islamic and customary law.²⁶ African customary law is a non-statutory source of law that derives its authority from customs, practices and religious laws.²⁷ Customary law is highly influential and predates colonialism. The multiple sources of law that inform family law jurisprudence reflect “attempts at negotiation, reconciliation, and accommodation”²⁸. During colonialization, the British imported a distilled version of English law to Kenya but allowed each individual community to maintain its own system with respect to family law (this explains the four distinct legal systems making up this area of the law).²⁹ While some fields of the law were allocated under this form of British law, others, like marriage, were left under the rubric of custom. Notably, statutory law was rendered supreme.³⁰ Following the end of colonial rule, the status of the legal system as a whole became unclear and there was a large push to develop a codified version of family law that incorporated previously unrecorded customs.³¹

The overarching statute regarding marriages is the *Marriage Act*³², which does not incorporate any form of customary marriage. This is highly problematic as the largest segment of Kenyan population marriages are polygamous and, as such, are a customary union governed under African customary and Islamic law.³³ Because the relationship between levirs and inherited widows are polygamous (the levir has to have a wife and may inherit multiple widows) this union falls under the umbrella of customary law, outside of the protections afforded by statute.

²⁶ Bessie House-Midamba, “Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance Laws in Kenya” (1994) 49:3 *Africa: Rivista Trimestrale di Studi e Documentazione dell’Istituto Italiano per l’Africa e l’Oriente* 375.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid* at 380.

³² *The Marriage Act*, RS 2008, C-150.

³³ *Supra* note 26 at 385.

The lack of codification and mere multiplicity of norms forming African customary law make it extremely difficult to militate against and regulate gender-based discrimination. Additionally, it is logistically impossible to assess breaches of a common standard of equality such as that outlined in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)³⁴.

Marriage Bill 2013

The *Marriage Bill 2013*³⁵ was introduced into Parliament in Kenya on July 16, 2013.³⁶ This bill is an attempt to unify the various laws regulating marriage in Kenya. The most notable change is that all customary marriages (including polygamous marriages) would be statutorily recognized. If passed, this legislation would afford widows particular protections in entering into polygamous relationships (such as criminalizing marrying a person under the age of 18) as well as outlining accepted reasons for divorce.³⁷ As it stands under customary law, women have little say in the dissolution of a marriage and are often stripped of any property acquired through the union.³⁸ Additionally, under customary law women themselves are deemed to be property and are unable to inherit their husband's estate.³⁹ It is only under statutory law that males and females are deemed equal in inheriting property, particularly in instances in which there is a will.⁴⁰ If this *Bill* passes and customary marriages were statutorily recognized, this may impact a woman's ability to inherit property from her husband, minimizing the need for widow inheritance.

³⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979 (entered into force 3 September 1981).

³⁵ B13-2013, *The Marriage Bill*, (Kenya), 2013.

³⁶ Frances Mureithi, "Kenya: Marriage Bill set for the house today", *The Star* (16 July 2013).

³⁷ *Supra* note 35.

³⁸ *Supra* note 26.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

CEDAW and Recommendations

Kenya ratified CEDAW in 1984 and by doing so committed “to undertake a series of measures to end discrimination against women in all forms”⁴¹, including incorporating equality as a guiding principle of its legal system and ensuring the eradication of “all acts of discrimination against women by persons, organizations or enterprises”⁴². Through ratifying this *Convention*, Kenya legally bound itself to put CEDAW’s principles into practice.

In its seventh periodic report on Kenya, comprised in early 2011,⁴³ the Committee on the Elimination of Discrimination against Women (“Committee”) assessed the new Kenyan *Constitution*, which came into force in 2010 and provided for a domestication of the *Convention* as well as included a *Bill of Rights*. The Committee praised the *Constitution*’s enhancement of women’s rights through its provisions that render any law (customary or otherwise) void to the extent that it conflicts with the *Convention*; guarantees equal citizenship rights for women; explicitly prohibits direct or indirect discrimination on the basis of sex, pregnancy or marital status; allows the government to take measures to redress disadvantage; and, finally, mandates that all laws in force prior to the new *Constitution* be amended to conform with its principles, if necessary.⁴⁴

The Committee also highlighted a number of areas of concern including the delay in enacting various bills which would eliminate gender-based discriminatory provisions, that there is a lack of awareness of the rights of women as set out in the *Convention*, the

⁴¹ *Supra* note 34.

⁴² *Ibid.*

⁴³ Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women*, Official Records, 2011, UN DOC CEDAW/C/KEN/CO/7.

⁴⁴ *Ibid* at 2.

persistence of adverse cultural norms that perpetuate discrimination against women, and, lastly, the obstacles faced by women in bringing discriminatory matters to the courts.⁴⁵

In response to these concerns, the Committee set out specific recommendations. The recommendations include enacting legislation that will combat discriminatory provisions and statutorily ensure equality for women and taking measures to remove any obstacles preventing women from accessing the justice system. With respect to the concerns about adverse cultural norms, the Committee specifically addressed the negative impact on women resulting from wife inheritance. The Committee implored the state to develop “without delay, a comprehensive strategy to modify or eliminate harmful practices and stereotypes that discriminate against women”⁴⁶. It was recommended that efforts be taken to educate and raise awareness of the harmful values and practices.⁴⁷ The Committee also advocated for development of social services aimed at reducing poverty among women.⁴⁸

Also of note, the Committee expressed concern surrounding the higher prevalence of HIV/AIDS among women, attributing this to “the persistence of unequal power relations between women and men and the inferior status of women and girls”.⁴⁹ The State is urged to enhance its focus on female empowerment initiatives.

With respect to property, the Committee noted that sufficient legislation to protect women’s interests in and rights to land have not been developed, and calls on the State to do so, as well as address negative cultural norms that affect a women’s right to property.⁵⁰

⁴⁵ *Ibid* at 3-10.

⁴⁶ *Ibid* at 5.

⁴⁷ *Ibid* at 9.

⁴⁸ *Ibid*.

⁴⁹ *Ibid* at 10.

⁵⁰ *Ibid* at 11.

Finally, the Committee implored the State to uniformly prohibit polygamy under all forms of marriage laws.⁵¹

⁵¹ *Ibid* at 12.