

QURAN AND CULTURAL AND LEGAL CHALLENGES ANALYSIS OF THE PRACTICE OF ISLAMIC LAW OF MARRIAGE AND DIVORCE AMONG THE AKAMBA MUSLIMS IN KITUI, KENYA

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ABSTRACT

This study seeks to investigate whether or not the Akamba Muslims apply all aspects of marriage and divorce. The study is undertaken in Kitui District in Kenya. It therefore attempts to establish the extent of the application and practice of the Islamic law on marriage and divorce among the Akamba Muslim community. The research seeks to identify and examine the grounds of divorce in Sharia and the Akamba customary law and investigate why a vast majority Muslims among the Akamba stick to traditional customs and values. The study also attempted to show the areas of disagreement between Sharia and the Akamba customary law with regard to marriage and divorce. The role played by the Kadhis court in resolving marital dispute has also been analyzed. Islam was introduced in Kitui by Muslim traders from the coast. It is not certain when the first caravan of traders reached the interior of Kenya from the coast. However it is believed to be around 1841 – 1888 A.D. Islam became stronger and grew to extend this new faith among the Akamba. In acceptance to the Islamic faith, the Akamba Muslims assimilated Islamic teaching gradually in their traditions and customs. However, there were some traditional customs that they did not relinquish. They did not accept the replacement of some aspects of customary practice of marriage and divorce. The study has seemingly indicated that the Akamba Muslim community strongly adheres to their ancestral religious customs as opposed to application of Sharia on marital disputes. The study shows that most marital and divorce cases were conducted according to customary law. Sharia was observed in most marriages and not in divorce. Ignorance on religious teachings was prevalent among the respondents. Therefore, it is recommended that religious education be taught to the Muslims. It is only then, that they will know what is required of them. Further to this, the study recommends that the offices of the Kadhi be provided with the relevant equipments and personnel to give it the capacity to function effectively and efficiently. The study recommends that the Kadhi courts be increased in Ukambani, that is, at least one Kadhi in every District

BACKGROUND TO THE STUDY

Muslim traders from the coast brought Islam to the Akamba of Kitui. It is not certainly known when the first caravans of traders reached the interior of Kenya from the coast. However, it is believed to be around 1841 – 1888 AD (Trimingham 1964:4). Generally we can say that by the end of the 19th century, Islam had penetrated to the interior of British colony of Kenya. The areas normally inhabited by Muslim were Mumias, Kitui, Kibwezi, Makindu and Machakos owing to the trading routes from the coast. According to Hakim (1977:24-27) Akamba commercial settlement had been established in Rabai before 1836. In latter part of the 19th Century, the Akamba trade with the coast was on the decline, as a result the coastal Arab and Swahili traders controlled the trade routes from the coast to the interior. The traders were missionaries at the same time, since they carried mission of spreading Islam wherever they went. The new Akamba converts to Islam lived with Muslim migrants harmoniously and gradually internalized Islamic practises such as fasting, reading the Qur'an, prayer and Maulid.

They also put into practise some aspects of Islamic personal status law. Again, they contracted their marriage in accordance to Sharia. Despite this, they were reluctant to accept other aspects of the Islamic family law, because they were in disagreement with traditional customs and values. Aspects of law like law of inheritance met a lot of resistance in this community. It is the traditional belief and practice of Akamba that women have no share in the deceased estate, contrary to the Islamic position. Incase of divorce, majority of the Akamba Muslim adhere to their traditional understanding and interpretation. If a wife commits adultery, she may be officially divorced. However, the family of the wife will have to pay back the bride wealth given by the husband in order to conclude the divorce process. There are cases among the Akamba where the husband opts to quietly divorce the wife. But in a case like this, even if they apart for the rest of their life, the traditional customs hold that the marriage is intact. The wife has every right to stay in the matrimonial home and the male offspring have the right of inheritance. On the other hand the husband is allowed to remarry since he can have as many wives as he intends.

Strongly, Islamic law discourages desertion of whatever kind and the wife has the right for legal redress in a case like this. (Amina 1994:74). Sharia applied by the Akamba Muslims was introduced in Kenya by the migrants from the Middle East in the first century since the inception of Islamic (Trimingham 1974:31). Certainly, Sharia was enforced fully along the Kenyan coast before the inception of British rule. This region of Kenyan coast belonged to the Sultanate of Zanzibar where Sharia was fully operative (Anderson 1970:85-86). In 1906 AD the colony implicitly accepted the practice of Islamic personal law and in 1923 AD the British colonial government accepted and introduced colonial government's law courts (Kenya 1968:156).

THE AREA OF STUDY AND THE CHALLENGE

It is imperative to know that a Muslim community in all aspects of lifestyle is always expected to be guided by Islamic teaching, principally by the Qur'an and the Sunna. Everyday life of the Muslims ought to be lived in the spirit of the religious law, which is the Shari'a. This determines what is permitted and what is forbidden, what is lawful and what is not, what is obligatory and what is relative. In one way, Islamic law regulates both private and public life of a Muslim (Ignaz Coldzihen, 1981). A vast majority of Muslims among the Akamba however, stick to traditional customs and values. In this respect, several aspects of Islamic law, including some aspects of marriage and divorce, are ignored or neglected. The Akamba traditional values and customs, instead, take an upper hand. Even where Islamic law on marriage and divorce seems to be put in practice, it conflicts with the customary practises and beliefs. This state of affairs has led to several questions. Are all aspects of Islamic law, with regard to marriage and divorce in full force? Is the emphasis on traditional Akamba customs and practice a big departure from Islamic practice, with regard to marital dissolution? These questions assist to shed more light on the challenge of this study. For instance, for the Akamba customary law of divorce to be valid, bridewealth must be returned. If the wife's family is unable to pay back bridewealth, the divorce process is incomplete, even though, the spouses may be living apart from each other. A dilemma sets in because the wife cannot be eligible to marry again. In addition to all these the former husband cannot provide for her, or for the children, to the extent of creating a generation of uncertainties since the wife and the children can no longer live a normal life.

The Akamba customary practice with regard to marital dissolution appears to give the man the initiative more than the woman. In Sharia, both parties have access to initiate divorce as needs arises. The practice more is that the Akamba men will deny their women this freedom to initiate divorce, since it is not in line with their traditional customs and values. It is common that in the divorce process, the woman, may be passive participant, while the man is mostly the accuser or the aggrieved party. However, in Islamic law, the practice of divorce is a little bit different because, even though the husband initiate divorce, he does it in collaboration with the wife and the presence of witnesses. This study therefore, seeks to investigate whether or not the Akamba Muslims apply all the Islamic aspects of divorce. The study takes into account that, the Akamba Muslims were practitioners of Akamba customs and values before their conversion. The grounds of divorce in Sharia and Akamba customary law and the conflicts that may be therein, makes the major part of this study. Marriage in the Akamba customs are legally valid and therefore divorce conducted under it is legally binding. Like any other customary laws, there is no particular judge to deal with Akamba customs unlike Muslim family law, which is handled by the Kadhi in courts of law. The Akamba customs are dealt with by council of elders chosen and accepted by both the conflicting parties (Kenya cap. 10(2) 1967).

MARRIAGE IN ISLAM

Marriage is highly recommended in Islam. Muhammad emphasized this when he stated that:

“whoever hates it is not of me” (Bukhari vol. 2. p.703)

Laymen and even spiritual leaders are enjoined to marry so that they can keep their chastity intact. In addition to marriage being of great necessity in the society, it is also of equal importance to safeguard moral integrity. Muhammad reports,

It is necessary for you to marry, because marriage is the most powerful against the movement of sight and the protection of your private parts, if one of you cannot afford it; let him fast because fasting weakens the sexual impulse (Maududi 1975:187).

In Islam, marriage is also a religious injunction which has different ruling due to different states of people. For instance, marriage is forbidden for an impotent person because he cannot consummate it. Secondly, a person who is unable to execute the responsibilities that go by marriage institution, especially provision for the family of food, shelter and clothing is forbidden to marry. Those who are unable to control sexual ambitions and desires are implored to marry or to observe daily fasting if they cannot afford marriage expenses and responsibilities. (Maududi 1975:187). Also members of the Umma who have reached marriage age and have control of their sexual desires and can meet marriage expenses are commended to marry.

Marriage is also recommended to even those who are sure that they can meet the expenses and bear the responsibilities involved. In Islam marriage is a contract but not just like any other contract but a sacred one. Marriage is dissoluble but its dissolubility is highly detestable in the sight of God. (Wahbah Al-Zuhayly 1989: 31-33). In Islam, before marriage takes place, there must be introductory procedures that are engagement and dowry.

(i) Engagement

Engagement as an introduction to marriage is essential. Engagement time gives chance for both the potential bride and groom to get acquainted to each other. Engagement grants an opportunity for the two to know the possibilities of living together. It is during this time, that the consent of the prospective couple is given and the consequent introduction to the two families is done. If one of the parties fails to consent, that, the young man or the young lady to be married, the marriage plans are called off. (Rahman 1981:25). It is worthy to note that wedding rings or engagement rings are not permitted in Islam. In Islam cohabitation is totally forbidden.

However, the prospective couple is r to visit each other but is strongly enjoined to observe the limit as prescribed in Islam. The two are not to be together at night or spend a night together because they are engaged or travel both alone unaccompanied. Though engaged, there are limited parts of the body the man is allowed to look. However, it is important to note that there are different opinions among jurists as to the extent to which a fiancé should look at a fiancée's body.

A vast majority of the jurist are of the opinion that Hanbali School of law if most reasonable. Hanbali school of thought allows the fiancé to see the fiancée's way of dressing when in the presence of her relatives. In other words he is allowed to look at her face, shoulders, hands, feet, head and lower limbs. All this must happen in the presence of at least one relative or in the open place like sitting room. All these injunctions are meant to prevent the possibility of pre-marital sex (Rahman 1981:138). The fiancé must dress decently. In Islam, forced marriages are forbidden and any lady has the right to denounce it as much as possible. Similarly, any young man has the right to vehemently refuse forced marriage to any lady. However, most Muslims like arranged marriages. Aisha the wife of the Prophet reported that a young girl called Khansa reported to her that she was forced into marriage by her father. Aisha informed the Prophet when he came. When summoned by Muhammad, the father agreed that he had forced his daughter into marriage. Then Muhammad gave the girl the option of whether to continue in marriage or dissolve it. (Al-zuhayly 1989:78).

(ii) Mahr, Dowry

Mahr or dowry is a substance or benefit offered to a fiancé as a marriage gift. Every Muslim woman has a right to get mahr during marriage. Matters pertaining to mahr among other preparatory issues are deliberated on in the engagement period. It is worth noting clearly that mahr is exclusively the girl's property. The parents of the lady do not have right at all to any portion in the ownership of mahr, unless she decides on her own volition to give something to the parents. It has to be noted that it is not a must that mahr be paid in full for a marriage to be solemnized or validated. The marriage would be conducted and lawful, so long as the bridegroom consents and agrees to pay the agreed amount of mahr. (Sidiqi: 1989:79). Normally, the onus is on the fiancé to pronounce the amount of mahr, therefore there is no principles or guidelines agreed upon for determining the amount of mahr to be paid. The amount pronounced by the fiancé is binding as long as the prospective husband agrees. Nonetheless, payment of mahr is mandatory, but may be paid in installments even after marriage has taken place. On this Qur'an says:

And give the woman (on marriage) their dower as a free gift; but if they, of their own good pleasure, remits any part of it to you, take it and enjoy it with good right cheer. (The Holy Qur'an 4:4)

The dower is a marriage gift that symbolizes love and affection. It safeguards a woman's economic position after marriage. Dower is enjoined by the teachings of Islam and is an important condition of marriage (see Qur'an 9-21; 2:229, 236-37; Abdalati 1977; Siddiqi 1922a). For a marriage to be legitimate in Islam dower is requisite. Sahih Muslim reports:

Allah's messenger prohibited *shighar* (which means a man) to gives his daughter in marriage on the condition that the other gives daughter to him in marriage without any dower being paid by either. (Sahih Muslim, Vol. 11, p.713)

In Sharia, however, large sums of money are discouraged. An exception is found where the husband agrees the amount suggested however huge it may be. In a case like this it is upon him to pay. More so, it is not advisable to set a standard amount because what someone sees as too much may be fairly manageable to another. During the caliphate of Umar, (634-644) people complained about huge amount charged for mahr. Abu Bakr found the practice of paying large sums of money for mahr unfair especially to the poor people. As a result, he decided to fix an affordable amount to all. When woman realize that their right to freely determine their mahr was interfered with, they strongly protested.

The leader of the women, Ummu Salama, because of the caliph decision recited the following verse to him:

“But ye decided to take one wife in place of another, even if ye have given the latter to a whole treasury of dowry, take not the least but of it back...” (The Qur’an 4:20).

The argument of Ummu Salama was that if God has not put limit to dowry, it should not be interfered with by anybody. Then Umar agreed with Ummu Salama, he accepted that the woman is correct and Umar, himself was wrong. Although there is no definite amount agreed upon for the mahr, Muhammad enjoined Muslim not to concentrate on dowry so much for the blessed marriages are those of the Law dowry. The criteria for Mahr have depended largely on the customs and traditions of the people. The Prophet has condemned excessive dowry in many instances. He says:

“The most blessed women are those of low dowry” (Vol. 8:6, Al-Zuhayly 1989:6)

Islamic Law of Divorce

Abdalati (1977) argues that for the divorce to be pronounced, a number of conditions should be fulfilled. These conditions are stipulated in the Quran and the Sunna. He further says that divorce is classified variously along several dimensions. These classifications are broadly two, that is, Sunna and Contra-Sunna divorce. Each of these two broad classifications has its variants. The Sunna divorce has three pronouncements (Quran 2:228-232) and Abdalati, 1977 232-236). On the other hand, Contra – Sunna divorce is any divorce pronouncement that is not done according to the Sunna procedures. Depending on the interpretation from various schools of law and jurists, contra-Sunna divorce will be considered religiously forbidden but formally valid. (Abdalati, 1977:236-242).

Further to this, Abdalati argues that the Islamic position on divorce has been criticized especially by non-Muslims. He brings forth criticism saying that; the Qur’an grants men complete liberty of divorce and demand of the man no justification for divorcing his wife. Thus, he can divorce her at his own caprice but no such facility exists for her. A criticism of this nature as documented by Abdalati on the subject on women rights in divorce in the Sharia law is totally untenable. All the four Sunni schools are in agreement that in Qur’an 2:229 women are given unconditional rights to divorce their husbands. Such dissolution of marriage is known as al-khuli. Al-khuli according to Sahih Muslim, vol, p.754 means “The putting off or Taking off a thing”. With regard to Divorce, the term means, the parting of a wife from her husband by giving him certain compensations.

Khuli is caused by the wife if she is dissatisfied in her marriage. The wife, without fault or guilt on her husband, returns the dowry as a compensation for material and moral losses incurred by the man (Abdalati 1977:239). On this point Abdalati is in agreement with Al-Faruq (1991:73) and Quraishy (1987:199).

The al-khuli marital dissolution in Islam, therefore, has foundation in the Qur’an and Sunna. However, Abdalati in discussing marriage generally in Islam says that, marriage is divinely ordained and at the same time a contract and so dissoluble. He strongly upholds that marital dissolution is abhorred to God, but only permitted if all effort for reconciliation have been exhausted. The Holy Quran stipulates that... “if ye (judges) do indeed fear that they would be unable to keep the limit ordained by Allah, there is no blame on either of them if she gives something for her freedom...” (2:229). The aforementioned Qur’anic injunction is further exemplified by a hadith recorded by Imam Bukhari, which says:

Narrated Ibin Abbas: The wife of Thabit bin Qais come to the Prophet (s.a.w) and said, :O Allah’s Prophet (s.a.w)! I do not blame Thabit for defects in his character of this religion, but I believe Muslims dislike to behave in un-Islamic manner (if I remain with him)” On that Allah’s apostle (s.a.w) said (to her), “will you give back the garden which your husband has given (as Mahr)?” She said, “Yes”. The prophet (s.a.w) said to Thabit, “O Thabit! Accept your garden and divorce her at once (Sahih al-Bukhari, vol. 7, p.150).

The argument that divorce in Islam is a right available mainly to the husband is therefore untenable. The criticism that Qur’an grants men complete liberty of divorce and demands of the husband no justification for divorcing his wife is in contradiction to the teaching and tenets of Islam. There are variant hadith as the above, recorded by Bayhaqi, Nasai, Tirmidhi and Ibn Majah and reported on the authority of Ibn Abbas. In the Muwatta of Imam Malik, Musnad of Imam Ahmad and the Sunan of Nasai and Abu Dawud we see similar hadith (Asad, 1980:50). Doi (1996) further gives other forms of marital dissolution, where the wife has the right for divorce, apart from al-khul. This type of marital dissolution falls under what is termed as remedy or faskh to divorce under certain valid circumstances. With regard to faskh a woman could seek a court’s redress. If the Kadhi is satisfied that she has been deprived in marital union, he could free her from marital bond (Doi 1996:90-92). There are circumstances under which a woman could sue for faskh divorce, namely, long absence depriving woman maintenance, apostasy and proved debauchery among other causes. In this argument Doi is in agreement with Strobel (1979:57) and Al-Faruqi (1991:73).

Generally a woman's recourse to divorce falls under "delegated divorce" and "conditional divorce". Delegated divorce applies where at the moment of contracting a marriage by signing the man agrees for his wife's right of divorce if and when she desires. On the other hand, conditional divorce applies in the case where a man had agreed during the marriage contract that the wife has a right of divorce if he does certain things that displease her (Abdalati 1977:242; Al Faruqi 1991:73).

MARRIAGE AMONG THE AKAMBA

Marriage among the Akamba was of great importance. It was to them the focus of existence. In each marriage, all the members of the Akamba meet: the departed, the living and those who were yet to be born. The whole family was deeply involved, and therefore, marriage to the Akamba was a religious act, and through it the family, which was the cradle of religious beliefs and activities, was kept intact. Marriage was a social arrangement by which every mukamba child was given a legitimate position in the society, determined by parenthood in the social sense.

This idea is better captured by Mbiti when he says,

"All the dimensions of time meet here, and the whole drama of history is repeated, renewed and revitalized...therefore, marriage is a duty, a requirement from a co-operate society, and a rhythm of life in which everyone must participate. Otherwise, he who does not participate in it is a curse to the community, he is a rebel and a law breaker, he is not only abnormal but 'underman'. Failure to get married under normal circumstances means that the person concerned has rejected society and society rejects him in return". (Mbiti 1969:133)

The foregoing makes one argue that marriage among the Akamba like in many African context called for procreation. There was no marriage in the Akamba sense unless the fruits of that marriage could be seen.

It was the obligation of all married couples to produce and contribute to the society by bringing forth new members. The parents were biologically reproduced in their children; they contributed in perpetuating human race. Marriage and procreation were therefore seen as unity which attempted to recapture, even if partly, a man's lost gift of immortality (Mbiti 1969:133). The foregoing brings forth the argument that the Akamba were and still are an epainogamous society. This is due to the fact that the Akamba supported, praised and sanctioned marriage and at times enforced it (Goode 1964:197). Marriage among the Akamba was a must and every adult and normal mukamba had to marry. In Akamba culture, marriage never constituted only sexual intercourse and change of status. It was more than this, for marriage was a rite of passage for all, a stage in ones life that is a must. As Mbiti has rightly said failure to get married under normal circumstances meant that one has rejected that society and in return the society rejects the person. The whole family, clan and society were involved in marriage among the Akamba.

Types of marital union among the Akamba

As has been argued above, marriage among the Akamba was an institution which perpetuated the life of the society. Marriage was not an individual's affair. The researcher has established that there were about five types of marriages in traditional Akamba community. These were monogamy, polygamy, ghost, child and *maweto* marriages.

Robert J. Cummings writing on polygamous marriages among the Kamba says:

In Ukambani, marriage is basically an economic question, for the number of wives a Mukamba has is a measure of his personal importance as well as his wealth. The more the marriages the more children one can potentially produce (1976:101).

Cumming's assertion underscores the fact that there were factors related to polygamy. One had to be wealthy enough to afford bride wealth for more than one wife. However, Cumming erred in that he confuses social status of a person with economic status. It is ostensibly misleading to say marriage is basically an economic question among the Akamba. Polygamy among the Akamba was a sign of social prestige and wealth. It was and still is, only for the rich people who could afford to pay bride wealth for more than one wife. Polygamy also showed that the men could afford to keep their wives in harmony and bring up their children effectively. In the field the researcher interviewed both polygamous and monogamous men. The polygamous were asked why it was necessary for them to have more than one wife. They said that they need more children, others said that the first wife became old and could not satisfy them sexually and could not give birth any longer. In traditional Akamba marriage, the children were also a sign of wealth. It was prestigious to have more than one wife and many offsprings. In view of the foregoing, two features come out strongly with regard to polygamous marriages among the Akamba. One as pointed out above, is that children were very important among the Akamba and that for a man to have many children he had to have many wives. If the first wife was incapable of producing children, the husband was free to marry another wife who would bear children for him.

The man could accumulate wealth through cultivation of shambas and exchanged the produce for cattle or even for pieces of land. Second to the Akamba it was prestigious to have as many wives and therefore, the larger the number of wives the higher the man's social status. It is important to note that it was immoral and unheard of for a man to have sex outside marriage among the Akamba. So if one's wife would not satisfy him sexually, instead of going out to look for alternatives, they resolved to marry another wife. The researcher has found out that most of the women who get married to polygamous men were those who had children either prior to marriage or girls who had children outside the wedlock. They got married because they continued to say that among other things the girls were attracted by the wealth of the man, so if the man was wealthy he could marry as many wives as he wanted to. In traditional Akamba marital unions marriage out of love and concern for the girl to be married was not emphasized and lacked basis. There maybe all kind of contemporary argument that polygamy was because of lack of religious faith but such arguments are strongly discounted by the position of the key informant in this study as stated above.

In traditional customary marriage among the Akamba, it was necessary that the plight of the girls who have children out of wedlock be addressed. Though, this happened rarely because of the traditional social sanction, such as taboos, rituals and blessing. But in the event that girls got children out of marriage union, they resorted to marry men who already had wives. Their major concern was to secure guardian and a home for the children. Since children were very important, the man who married such a girl was very fortunate as he added his social status and prestige. Sometime young girls were forced by their families to marry old men who already had stable families. There were reasons for such behavior. Either the family had already accepted bride-wealth while the girl was still a child or the family wanted to make sure that their daughter settled in an already stable marriage.

The other types of marriages among the Akamba are the ghost, *maweto* and child marriage. On ghost marriage, Mbiti says:

“...if a son dies before he has married, the parents arrange for him to be married in absentia; so that the dead man is not cut off from the chain of life which is supreme and most important”
(Mbiti 1969:144).

As Mbiti underscores, traditionally, ghost marriages occurred when a young man who had attained a marriageable age, died before he was married. The parents of the dead man looked for a girl, proposed to the girl's family, and if they accepted, paid the bride's gifts and took the bride home to her ghost husband. This type of union in Kikamba was called *kuungamia isyitwa* (literary translated would be to preserve the name of the dead man). A key informant told the researcher that the family of the dead son took care of the girl and looked for a genitor for her. Henceforth, the children born of this union assumed the dead man's name. Since every mukamba wife had a spirit husband, whose work was to make sure that she conceived, in the case of ghost marriages the dead man became the spirit husband to the girl.

The *maweto* marriages are as a result of women who are socially married to other women for the reasons of procreation. In the Akamba traditional society, the woman who married an *iweto* (singular) was herself a married woman, who was either barren or had given birth to daughters only. The researcher gathered that the woman who married the *iweto* first had to have consultations with her husband, and then both chose a girl whom they wanted to incorporate into their family. The wife, in her husband's presence or in the presence of one of the elders from her husband designated or pronounced the girl as wife of her son who was never born. The husband or an elder from his clan approached the family of the girl and proposed to them. If the family accepted the proposal, the bride's gifts were given and the designated girls was given to her home by the woman and her husband. The responsibility to look for a genitor (the man with whom the *iweto* will bear children) fell on the woman's husband. There were cases where the woman arranged with her husband and allowed him to be the genitor. Even though, the children born of the union were socially his grandchildren. It was so because the children were born not in his name, but that of his son. His wife, who designated the *iweto*, became the *iweto*'s mother-in-law.

A vast majority of respondents among the Akamba elders were unanimous that *maweto* were very important social phenomena among the Akamba. Such unions show explicitly that the Mukamba was at pains trying to perpetuate the family name and this perpetuation of society and continuation of human race was highly esteemed. The woman who designated a girl to be her son's wife, wanted to see the name of her son, who biologically was never born, but who socially was born, continued and kept alive. The children of *iweto* assumed their grandmother's name. There were, however, instances where the children assumed their grandmother's name. such instances normally were when the grandfather never married another wife and therefore had no other children named after him. Apart from the *Maweto* and ghost marriages, the Akamba practised child marriages. Child marriages occurred in a situation where an elderly couple bore only one son in their old age. In this instance, the father of the boy chose a girl for his son, and they proposed to the family.

This was done to make sure that before he died, his son would have children to remember him. The girl was given to one of the male relatives to act as a genitor. In child marriages the father of the boy should not act as genitor as this was equal to incest. When the boy grew up and had gone through initiation rites, the woman was officially handed over to him as his legitimate wife. All the children born to his wife before the handover is done assumed his name, though biologically not his. Hitherto, we have discussed marriage among the Akamba and some of the marital unions which were found in that society. Monogamous, polygamous and Maweto marriages are still found in the community. Ghost and child marriages are rare if found at all. We have seen that the Mukamba in all these marriages was at pains trying to perpetuate the family name and societal continuity. Gerald Leslie says that marriage can also be looked upon as a complex of customs which regulate and enhance the relationship between a couple and creation of a family. He continues to say that marriage also specifies that appropriate way of establishing a relationship, and within it also includes the provision for terminating this type of relationship (Leslie 1973:14).

RESEARCH FINDINGS

In the overall, of all marriage conducted by both male and female respondents, 66% were constituted in accordance with Sharia. 30.5% of all respondents conducted their marriage customary. The respondents neither Sharia nor customary law were only 3.5%. The manner in which the marriage was conducted has an influence on its dissolution or divorce. Muslims who have conducted their marriages customary or both through customary and Sharia are caught up in the mixture of the two. They find themselves in a situation of dilemma as to which Law to follow, Islamic or customary. They are Muslims and Islam as such gives the room for divorce although conditionally. Also, they are Akamba and were followers of their customs before they were Islamized. According to the Akamba customs, the dowry has to be returned in full for the divorce to be deemed complete. In case where the spouses recourse to divorce without the fulfillment of all requirements of divorce, customarily that is desertion and is not divorce.

Therefore the Islamic law on divorce, unlike Islamic law of marriage is hardly assimilated and rarely practised among the Akamba Muslims. The payment of cows and goats as dowry which is found in many East African communities and also among the Akamba is a strong stabilizer of marriage and it means that they have to be returned when and if the marriage is dissolved. To the Akamba, divorce has not occurred unless bride wealth is returned. The study confirms strongly that the customary law of divorce is strongly practised among the Akamba muslims, among both men and women and Sharia Law of divorce is not strongly followed. 85.2% of all divorce cases were conducted under customary law. In all the male customary divorce cases feature 80.5% whereas amongst the female respondents 90.1%. it would be expected that customary law of divorce could prevail among the higher age groups than the lower ones but the reverse is true in this study. This is because the Akamba Muslims are strict in teaching young Kamba men and women their customs than their religious laws. The researcher found out that one of the major reasons for preference of customary law is due to ignorance of religious teachings. The number of adherents to Islam who are well taught on their religious responsibilities are few. The study establishes that most Imams and Madrasa teachers do not have adequate and specialized knowledge to impart Sharia.

The subject on religious teaching traces to the first contacts between the Islam and the Akamba. The initial propagators of Islam were less interested in religious teachings. They mostly paid attention to their cultures like dancing beni, a Swahili traditional dance which was performed with pompant colorfully decorated. The dance was commonly performed during big occasions like Idd, Maulid and during wedding ceremonies. The new converts to Islam among the Akamba, therefore, perceived beni as a religious rite since it was Sharifs who were supposed to be religious leaders who led the ceremonies. The emphasis put on these Swahili practises downplayed the key religious doctrinal emphasis of Islam. Contemporary Akamba Muslims are hesitant to consult Muslim authorities for the domestic conflict especially when the decision on whether to divorce or not has been reached. It is only 13.5% out of the divorce cases were taken to the Kadhi court. Others were 33.5% in which Sheikhs or assistant registrar were consulted. The remaining 53% were neither taken to any Muslim authority nor to the court and as a result they were determined according to the customary law. There are a number of factors which lead to this situation. One of them is that the Akamba understand and identify themselves first as Akamba and secondly as a Muslim. In this regard, they find it difficult to relinquish some of their customs, especially those that are not in line with Sharia among them the Customary Law of divorce. The other factor is marginal knowledge of religious law and preference of their traditional customs. When they consult their religious leaders and they are given a different opinion from the customary one they are dissatisfied. They therefore rule out going to the Kadhi where they expect no better solution. Kadhi's area of jurisdiction is also very wide. One Kadhi represented the whole Eastern region and was based in Mombasa by the time of this study.

CONCLUSIONS AND RECOMMENDATIONS

In summary, we have seen from the current study that the Akamba Muslims give their customs and traditions higher consideration to Sharia, though it was not easy to establish that from the factors causing divorce. This is because a vast majority of the causes for divorce in Akamba traditional religion are similar to those of Sharia. Nonetheless, the study has confirmed that the Akamba Muslims adhere to the customary law procedures for divorce than to the divorce procedures of Sharia. This has been confirmed because 67% of all the divorce cases were initiated by either the wives running away or were sent away by their husbands from their matrimonial homes. Another 20% of the divorce cases were the wives immediately after leaving the husband, eloped with other men and 6% of the cases were initiated by desertion and only 7% of all divorce cases were heard and determined by the Kadhi.

The fact that the Akamba Muslims give their customs an upper hand when it comes to divorce matters is explicitly confirmed in this study by the husbands demand for reimbursement of dowry. Most of the Akamba Muslim husbands demand that the bride wealth be paid back to them during divorce cases despite this being abhorred in Sharia. This refund of bride wealth is a fundamental religious requirement in the traditional customs of the Akamba. As far as the people are concerned, even though the marriages were conducted according to Sharia, it does not deny them the right to claim back their bride wealth. The divorce process is no longer complete customarily unless the bride wealth is returned. The idea lingers supreme in the mind of the Akamba Muslim even though it lacks Sharia backing. If the refunding is not done, the couple will have no right to divorce no matter the magnitude of the problem. It will be considered as a temporary separation and the wife will have to remain with the husband even if it is impossible. However, this may not be practical in some instances and due to the torment the wife is in, she chooses to run away. She may run to her patriarchal home or altogether run to another man.

It is worthy to note that the Akamba customary law of divorce favours the men and sidelines the women. Women are sidelined especially when the customs do not give them an express outlet to initiate divorce. They are also sidelined when they cannot divorce the men due to alcoholism, provided these men do other matrimonial duties. If a woman is involved in alcohol taking she is undoubtedly isolated by the clan and consequently divorced. This patriarchal nature of the Akamba community put women in a prejudiced position in marriage.

RECOMMENDATIONS

The research has narrowed itself to marital dissolution among the Akamba Muslims. The researcher recommends that there is need to improve on Kadhi's courts in Kenya particularly in Kitui district. This will make the Muslim matters pertaining to personal status law be efficiently and effectively addressed. The Kadhi's court in Kitui is ill-equipped and this lowers its efficiency. There is only one assistant registrar who uses his own house for the office. The government should therefore provide this office with sufficient equipment and manpower and improve the Kadhi court to be in line with the newly promulgated constitution. There is need to increase the number of Kadhis to cater for Muslim population and also to bring services closer to the people. At least one Kadhi court in every district will provide efficient and effective services. The assistant registrar in Kitui can be made full Kadhi and be assigned Kitui district alone. Currently he serves both Kitui and Mwingi and this is an extensive area. At the same time, the government should provide the Kadhi with proper means of transport to enable them to attend Muslims in different localities within the prescribed times. The areas represented by the Kadhi should not necessarily have boundaries as those of provincial administration.

The Islamic population is mostly concentrated in some specific areas and those areas need to be made the Kadhi zones to cater for any anomalies of assigning a Kadhi in a vast area. Some of the respondents attributed their delay and failure to report to their matrimonial problem to the Kadhi's office to long distances. People from Mwingi, Migwani have to go to Kitui which is a distance of over one hundred kilometers. The Kadhi's areas of authority should be extended to comprise and cater for all Muslims irrespective of their original marriages. New converts to Muslim who have solemnized their marriages in other traditions, say customary or civil, will miss the privilege of being allowed to effect the Islamic law of divorce if and when they wish to terminate their marriages. They are therefore compelled by the constitution to divorce according to the law in which their marriage was officiated. The freedom to apply the Islamic personal law upon conversion of an individual is curtailed. It is the view of the researcher that the freedom is directly linked with the freedom to exercise one's faith or freedom of worship which every citizen is guaranteed. The researcher has observed that the assistant registrar in Kitui is elderly and may also be the case to several others. He is over 65 years. Consequently, the study recommends and suggests that the assistant registrars ought to be strong, energetic and determined personnel. They need also to have formal education background.

When an assistant registrar is ten to fifteen years past retirement age, he cannot execute the religious duties on personal law efficiently and effectively. Such a person is weak and since the registrars do not hold centralized offices and move from place to place, advanced age becomes a big impediment to performing his duties. There is need for assistant registrars to be provided with offices in the courts of law in their areas or wherever else the government may see appropriate so that the people do not have to go to their houses for services.

The time allocated for training for Kadhis before they assume office is short and insufficient. They normally have one week inaugural seminar before assuming official duties. The seminar is held and conducted in the High Court in Nairobi. The inaugural seminar is geared towards familiarizing the new Kadhi with the court procedures. This seminar is virtually important and one week is a very short time.

If the advocates and the judges in Kenya are trained for four years and awarded a degree in law, then they proceed to Kenya School of Law for a minimum period of one year before they are licensed to be practitioners, the Kadhis have virtually no training in that case. Therefore, the Kadhis are not conversant with the law of the land. The government should take initiative and introduce courses for the Kadhis and assistant registrars. The government can possibly train people within or without Kenya who can resultantly train the Kadhis on court cases and legal duties. It is worth to note that the fees required for opening a file and other preliminary procedures are exorbitantly expensive, this is an obstacle against the courts to executing their duties. The Kadhi's courts are there to ease Muslims' problems and when most people cannot afford the expenses, the purpose of the courts is defeated. This part of the reasons why people revert to customary laws because they offer services virtually for free and if there is a cost, it is met by the clan members. The government should also consider a way of reducing these costs.

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