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Muslimsk skilsmässa i Kenya och skydd för kvinnor som flyr våld i hemmet

Fråga:

- Är det möjligt för muslimska kvinnor att ansöka om skilsmässa i Kenya?
- Finns möjlighet till skydd från staten (härbergen) för kvinnor som flyr från övergrepp i hemmet?

Svar:

Muslimska äktenskap och skilsmässor i Kenya lyder under "Mohammedan Marriage and Divorce Registration Act" och "Mohammedan Marriage, Divorce and Succession Act" (Kaptiel 155 och 156). I källförteckningen finns länkar till lagarna i fulltext. Enligt en artikel från Daily Nation i maj 2009 finns ett lagförslag som strävar efter att slå samman de olika äktenskapslagar som finns i Kenya (kristna, muslimska och hinduiska m.fl.) till en gemensam lag.

U.S. Department of State skriver i sin årsrapport från 2008 att kvinnor som utsätts för våld i hemmet är ett allvarligt och omfattande problem som ofta tolereras av samhället

och domstolar. Olika frivilligorganisationer såsom Law Society of Kenya (<http://www.lsk.or.ke/>) och Federation of Women Lawyers (<http://www.fidakenya.org/>) tillhandahåller gratis rättshjälp till en del våldsoffer. OMCT beskriver i en rapport från 2008 olika former av diskriminering som den kenyanska kvinnan utsätts för när det gäller våld i hemmet och vilken hjälp som finns att tillgå från statligt håll. Uppgifter finns vidare om olika frivilligorganisationer som arbetar för att hjälpa utsatta kvinnor. OMCT konstaterar att antalet härborgen som kan skydda våldsoffer i stor utsträckning inte är tillgängliga för många kvinnor.

Källor

Lagstiftning

“(5) The jurisdiction of a Kadhi’s court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.”

Källa: Kenya Law Reporting. Constitution of Kenya. Revised edition 2008

http://www.kenyalaw.org/family/statutes/download.php?file=The_Constitution.pdf

“75. The Marriage Act (Chapter 150 of the Laws of Kenya) governs marriage in Kenya. Marriage is open to consenting parties (a man and a woman) of 18 years and above. In practice, early marriages still occur in some parts of the country although they have been criminalized under the Children Act. Other pieces of legislation relating to marriage include the African Christian Marriage and Divorce Act (Chapter 151 of the Laws of Kenya), the Hindu Marriage and Divorce Act (Chapter 157 of the Laws of Kenya), and the Mohammedan Marriage and Divorce Registration Act and Mohammedan Marriage, Divorce and Succession Act (Chapters 155 and 156 of the laws of Kenya respectively) and African Customary law.”

Källa: United Nations Economic and Social Council. Implementation of the International Covenant on Economic, Social and Cultural Rights. Initial reports submitted by States parties under articles 16 and 17 of the Covenant Kenya. September 2007

<http://www.unhcr.org/refworld/pdfid/47343c2e2.pdf>

The Mohammedan Marriage, Divorce And Succession Act:

"3. (1) Mohammedan marriages, whether contracted before or after the commencement of this Act, shall be deemed to be valid marriages throughout Kenya, and the parties thereto shall, subject to the provisions of this Act, be entitled to any relief by way of divorce or otherwise which can be had, granted or obtained according to Mohammedan law, and such law shall apply accordingly."

(An Act to amend the law relating to divorce and matrimonial causes in the cases of Mohammedan marriages, and relating to intestate succession in certain cases)

Källa: Kenya Law Reporting. The Mohammedan Marriage, Divorce and Succession Act. Revised edition 2008 (1984)
<http://www.kenyalaw.org/family/statutes/download.php?file=The+mohammedan+Marriage,+divorce+and+succession+act.pdf>

The Mohammedan Marriage And Divorce Registration Act. Chapter 155:

"9. The parties to a marriage or divorce recognized by Mohammedan law, or if the man or the woman or both are minors their respective lawful guardians, shall register such marriage or divorce with an assistant registrar within seven days from the celebration of such marriage or the pronouncement of such divorce, as the case may be."

Se en beskrivning av handläggning av skilsmässa i kapitlet SECOND SCHEDULE (s.7 (b) Form Of Register Of Divorces

Källa: Kenya Law Report. The Mohammed Marriage and Divorce Registration Act. Revised edition 2008 (1984)

[http://www.kenyalaw.org/family/statutes/download.php?file=The Mohammed Marriage and Divorce Registration Act.pdf](http://www.kenyalaw.org/family/statutes/download.php?file=The%20Mohammed%20Marriage%20and%20Divorce%20Registration%20Act.pdf)

"167. Marriage under Kenyan law is governed by any one of the prevailing solemnization of marriages in Kenya through the following provisions:

- African Christian Marriage and Divorce Act Cap 151 that governs Christian marriages.
- Marriage Act Cap 150 that governs Civil marriages.
- Mohammedan Marriage and Divorce and Succession Act Cap 156, that governs Islamic marriages.
- Hindu Marriage Act Cap 157 that governs Hindu marriages. African Customary Marriages.
- Individuals can also get married under African customary law provided the marriage conforms with all the required rituals and practises of the relevant community. There is currently no statute governing African customary law marriages – this is a lacuna in the law. Furthermore there is no provision for the registration of African customary law marriages.
- It is important to note that the government through the Law reform Commission has started a process to review the marriage laws, which laws will take cognizance of the various provisions of the Convention. On the other hand, the media has been proactive in changing the stereotypes that have continuously discriminated against women."

Källa: United Nations. Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women Combined fifth and sixth periodic reports of States parties Kenya. Oktober 2006.

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f6c7af2>

Beskrivning av den muslimska lagstiftningen:

“3. Talaq (Divorce):

- i) The Kadhis courts handle divorce cases. However, Kadhi and his representative dispensed on divorce cases without witnesses appearing in the court.
- ii) A case was reported in which Kadhi had issued a letter of divorce in the absence of the defendant who was a woman (wife).
- iii) Certificate of marriage was a prerequisite in the dispensation of divorce cases. It was not only a document that affirmed legality of the marriage but also proof of the couples' religious status as Muslims. This has brought a lot of injustices on women.

4. Consequences of Divorce:

i) Iddah (a woman's waiting period):

Kadhis did not address iddah whenever they dispensed on divorce cases. Likewise inheritance of property in divorce was not addressed.

ii) Mahr (dowry):

Some Muslim women acknowledge that the representative of the Kadhi addresses the issue of mahr in divorce. They note that in most cases, mahr is actualized only in divorce for example a sewing machine was delivered before the representative of the Kadhi from where the defendant (a woman) collected it.

iii) Custody of children:

The women had divergent views on whether the issue was addressed by the Kadhi or not. A victim of the circumstance recalled Kadhi's effort to have them join their mother to an extent of deploying the police.

At times neighbour's children were left on their own (not placed under definite guardianship) after Kadhi had irregularly issued divorce to their mother; and after She had been put under duress her husband (plaintiff before Kadhi).”

Källa : Musawah. Kenya Report to Musawah. 2008

<http://www.musawah.org/docs/research/country-reports/Kenya-report.pdf>

<http://www.musawah.org/docs/pubs/home-truths/Kenya-GR-EN.pdf>

“Succession

The Bill also seeks to consolidate all the marriage laws into one. There are seven Acts of Parliament relating to Marriage — Marriage Act, African Christian Marriage and Divorce Act, Matrimonial Causes Act, Subordinate Courts (Separation and Maintenance Act), Mohammedan Marriage and Divorce Registration Act, Mohammedan Marriage Divorce and Succession Act and the Hindu Marriage and Divorce Act.

All marriages under the Bill will have the same legal status. Should Parliament pass the new Bill, common spectacles of women claiming to be the groom's wife and trying to stop a marriage ceremony will be a thing of the past.

This is because the Bill gives the disgruntled woman the right to submit her objection in writing to the Registrar, who can stop the marriage until the objection is determined."

Källa: Daily Nation. Kenya marriages face drastic makeover. Maj 2009

<http://www.nation.co.ke/News/-/1056/593046/-/view/printVersion/-/xsy9v0z/-/index.html>

Våld i hemmet /skydd från regeringen/härbergen

"Domestic violence against women was a serious and widespread problem but often condoned by society and the courts. The penal code does not contain specific provisions against domestic violence, but treats it as assault. Police generally refrained from investigating cases of domestic violence, which they considered a private family matter. The 2005 Kenya Demographic and Health Survey revealed that more than half of women had experienced domestic violence after the age of 15. In July a court of appeal overturned the murder conviction of a man who killed his wife in 2004, ruling that the man's intoxication negated his ability to form the intent to murder. The court convicted him of manslaughter and reduced his sentence by three years. In August police arrested a man in Homa Bay and charged him with murdering his wife because she refused to have sex with him. The case was ongoing at year's end. NGOs, including the Law Society of Kenya and the Federation of Women Lawyers, provided free legal assistance to some victims of domestic violence."

Källa: U.S. Department of State. 2008 Country Reports on Human Rights Practices – Kenya. Lifos. 20445
<http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm>

“The Constitution of Kenya does not provide equal citizenship rights for women. Section 82 (4 (b) and (c)) of the Constitution of Kenya, which provides that the Constitution’s guarantee of non-discrimination does not apply with respect to personal laws, in particular in the areas of marriage, divorce, adoption, burial and succession still remains.”

“As regards women, the persistence of certain cultural norms, traditions and stereotypes, as well as de jure discrimination regarding their role in society, perpetuates violence against women and girls in Kenya. In this respect, the Committee on the Elimination of Discrimination against Women (CEDAW) expressed concern that the “State party has not taken sustained and systematic action to modify or eliminate stereotypes and negative cultural values and practices”.¹² Most gender-based violence cases remain unreported, or at least unpunished, and this occurs in particular with respect to sexual violence. Besides the fact that rape occurs regularly in Kenya, the lack of adequate systems within the relevant institutions means that such cases are marred by irregularities and lack of sufficient evidence, and consequently most cases are not fully prosecuted. Police officers are not adequately trained to treat matters related to gender-based violence and many officers still regard domestic violence, including marital rape (which remains an issue “untouched” by Kenyan law), as a private affair. In many cases, law enforcement agents have been known to ridicule women reporting such matters. This has led to a lack of confidence in the Government’s response and has had the additional effect of further inhibiting women from reporting violence inflicted on them.”

2.2 Domestic violence sid. 14

3.3 Domestic violence sid 17

"The persistence and even the increase of domestic violence may be attributed to the fact that there is no specific law that deals exclusively with that issue. The current practice is to criminalise the offence under the Penal Code as assault/battery, but this usually disregards violence that is perpetrated in the home."

"The enactment of the Family Protection (Domestic Violence) Bill has been pending since 2002. This bill attempts to deal comprehensively with all aspects (physical, psychological and sexual) of violence within domestic settings and would be the only statute in Kenya that recognises domestic violence as a crime. The bill also makes provisions for counselling and psychological attention for the victims of domestic violence and for safe houses for victims who are at risk in their current domestic situations. It makes provision for protection orders against perpetrators, including denying them access to the matrimonial home, provides for a "friend" to make an application for a protection order on behalf of another, and provides for rehabilitation and setting up of a fund for domestic violence victims. The fund is to be a Government initiative."

"Domestic violence

Attitudes of police and other law enforcement officers with regard to the issue of domestic violence further abet the persistence of violence against women. In most police stations, the officers are reluctant to record any cases of domestic violence as they are unwilling to interfere in "domestic issues". Domestic violence is still not treated with the same gravity as other cases when they are reported. Often the victim reporting the incident is asked what she did to provoke the violence and is encouraged to resolve the issue at home."

"6.3 The right to protection

Regarding the protection of women victims of violence, it appears that the access to shelter, safe houses and psychosocial assistance is a crucial component of accessing justice. Indeed, in Kenya, most of the victims of sexual and physical violence are further exposed to violations when they are forced to return to the place they were abused due to a lack of shelters and safe houses. Some victims opt not to report or pursue cases for this reason.

Shelters for the protection of victims of violence are still largely unavailable in Kenya and these services are mainly provided by civil society organisations. In Nairobi, only the Women's Rights Awareness Programme (WRAP) provides shelter for women who have been victims of violence and must be removed from their home situations. However, WRAP is overwhelmed and can only cater for very few women, and even then for a very limited period of time. In most cases, women will opt to remain in their violent situations as the centre is unable to provide shelter for a woman and her children and many times going to a shelter will mean separation from one's children.

With regard to protection of witnesses, the Sexual Offences Act provides for the protection of vulnerable witnesses who are giving evidence in sexual offences cases, including minors. The Family Protection (Domestic Violence) Bill, if passed, would provide for the establishment of safe houses for victims of domestic violence who have got to be removed from their home situation."

Källa: OMCT. Violence against women and children in Kenya
An alternative report to the Committee Against Torture
November 2008

http://www.omct.org/pdf/UNTB/2008/alt_report_on_violence_against_women_children_kenya.pdf

"14. The Committee notes with concern that article 82 (4) of the Constitution exempts matters

of personal law such as marriage, divorce and devolution of property on death, as well as customary law applicable to certain tribes, from the constitutional prohibition of discrimination, with the effect that women are generally discriminated against in these areas of law. (art. 3)

The Committee recommends that the State party repeal article 82 (4) of the Constitution and ensure that the new Constitution guarantees equal rights of women to matrimonial property during marriage and at its dissolution. It also recommends that the State party raise public awareness of the need to abolish laws and customs which discriminate against women and adopt the Marriage, Matrimonial Property and Gender Equality and Affirmative Action Bills.

Källa: United Nations Economic and Social Council .
 CONSIDERATION OF REPORTS SUBMITTED BY STATES
 PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT
 KENYA. Concluding Observations of the Committee on
 Economic, Social and Cultural Rights. December 2008
<http://www.unhcr.org/refworld/pdfid/493f94875.pdf>

"Acceptance still characterises attitudes toward domestic violence in Kenya. Indeed, this acceptance extends to many women themselves: UNICEF Childinfo data indicate that 68 per cent of girls and women in Kenya believe that a husband or partner is justified in hitting or beating his wife under certain circumstances.⁵¹ At the same time, it is unlikely that the police will intervene concerning what is generally perceived to be a "private" matter. Reporting violence is also a challenge for women: to file a complaint, three documents are required - a police abstract, a "P3" form (for which, it is reported, a woman may even be required to pay), and a medical report. In addition to this, they must overcome cultural prejudice and fear, a still greater obstacle given the lack of female police officers in Kenya. The positive initiative to set up "gender desks" in police stations has, like many policies, proved to be poorly

implemented. In the case of marital rape, there is no specific legislation against this crime under Kenya's Sexual Offences Act 2006."

(<http://www.thesexualoffencesact.com/>)

Källa: International Commission of Jurists Kenya; World Organisation Against Torture ; Centre for Minority Rights Development . The lie of the land. Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Kenya. November 2008.

<http://www.unhcr.org/refworld/pdfid/491401942.pdf>