The relevance of matrimonial gifts in Kenya. Whose laws are they anyway?

Anne Anyango Rasowo* and Michael Wabomba Masinde

School of Law,
Moi University,
P.O. Box 3900-30100,
Eldoret, Kenya
Email: a arasowo@gmail.com
Email: michaelmasinde@gmail.com
*Corresponding author

Abstract: This paper examines the validity of payment/exchange of matrimonial gifts as a condition to sealing marriage under the African customary laws. The paper also critically analyses the legal position of the practice and the emergent constitutional and human rights issues that arise due to the practice. The issues include wife selling and degradation of women as a result of the payment/exchange of matrimonial gifts. The main objective of the paper is to analyse the effectiveness of Kenya’s legal, judicial and legal policy framework in regards to marriage gifts.

Keywords: marriage; marriage gifts; dowry; women; Kenya.


Biographical notes: Anne Anyango Rasowo is a graduate student at the Moi University, School of Law in Kenya. She is an advocate of the high court of Kenya. Her main areas of specialty and interests are in child and family laws at both domestic and international level and human rights.

Michael Wabomba Masinde is currently a student at the Moi University, School of Law in Kenya, where he is pursuing his Master of Laws (LLM) degree in Child and Family Law. He is an advocate of the high court of Kenya and is a member of the Law Society of Kenya. He is also a member of the Law Society of Kenya’s Child Law Practitioners and Gender Committees. He has a keen interest in human rights, particularly the socio-economic rights, international law, international private law and child rights.

1 Introduction

The first part of the paper describes the practice of matrimonial gifts and goes ahead to highlight the African cultural practices together with Hindu and Christian attitudes towards the practice. The second part of the paper delves into the legal and regulatory
framework on matrimonial gifts and discusses both the international and national legal provisions in the Kenyan context on the subject. In this regard, discussions are drawn from CEDAW and its subsequent reports, UDHR and ICCPR, the Kenyan Marriage Act and constitution coupled with jurisprudence from case law in the Kenyan courts. The third part of the paper discusses the emergent issues and problems that have cropped up as a result of the practice of payment/exchange of matrimonial gifts and the issues raised include domestic violence, status of the African woman and commercialisation of the practice. Lastly, the fourth part gives a summary of the author’s views in regard to the practice.

This paper explores two main areas and the first is to ascertain the appropriate position of the practice of payment/exchange of matrimonial gifts and the human rights issues that have emerged as a result of the practice. The paper further seeks to establish if there is a need for the practice and its relevance in today’s society.

Matrimonial gifts are the incentives that are paid/exchanged between families of intending spouses under the African customary laws and it is noteworthy to state that marriage gifts have been referred by different terminologies by different authors namely dowry (Randeria and Visaria, 1984; Cotran, 1987), bride price (Randeria and Visaria, 1984), marriage gifts (Nsereko, 1975) and bride wealth (Ogbu, 1978). The justification of choice of different words to refer to matrimonial gifts is perhaps a means of giving dignity to the practice and another justifiable reason would be because of the side of the family that receives/pays the marriage gifts (Ogbu, 1978).

Dowry when used refers to the transfer of parental property by the bride’s parents at the time of the marriage of the daughters in the family whereas bride price refers to the payments made by the groom or his family to the bride’s parents at the time of the marriage. Whether the terms marriage gifts, dowry, bride price or bride wealth are used at the end of the day they serve the same purpose. This is supported by the fact that in almost all the indigenous African societies marriage tokens have to be paid as a preliminary to marriage by any bridegroom as a form of marriage payment so to say (Nsereko, 1975).

Cultural practices differ amongst states and communities (Meekers, 1992). According to an unpublished article known as payment of dowry and the church which was written by the theological advisory group in the year 1996, it was argued that the Kenyan woman today still expects and demands bride price to be paid upon her head as a condition for her hand in marriage. The article elicited that even the most empowered women in Kenya believe that to be taken seriously they have to be paid for bride price worthy of their status and this goes to show that the payment of marriage gifts is held dear. The Asians who profess Hindi faith task the women to pay dowry in form of cash, jewelers, electrical appliances and other household belongings and refer to the payment as stridhan. Stridhan is a Hindi word derived from the words woman and property and it permeates all forms of marriage in all castes. The existence of stridhan is an ingrained part of the Indian culture which is highly male dominated therefore the existence of the custom of bride price indicates that women understand the importance of financial independence and safeguarding their interests (Selwyn, 1979).

Africans have thrived under the rule of customary laws and payment/exchange of marriage gifts has formed part of these laws. In ancient society, dowry was paid in terms of cereals, cows and goats but today with the advanced technology all the items are liquidated. The main objectives of exchanging matrimonial gifts were and continue to be
to ensure that the girl was properly treated and in the event of mistreatment she could always return to her home and be accepted by her parents (Cotran, 1987). The second objective of exchanging matrimonial gifts was that it was a means of keeping the relations between the two families alive and strong (Meekers, 1992). Marriage gifts were also paid/exchanged as a sign of showing appreciation at the time of the marriage and further the payment gave validation to customary marriage (Shope, 2006). Lastly, the exchange of gifts conferred spouses to have conjugal rights and give the children affiliation (Shope, 2006).

Bride wealth and the woman’s status in society are related in the African society. High bride wealth is pegged with high stability of a marriage because the kinsmen would find it hard to return the same in the event that such a marriage broke down. This would largely go to show to what extent the African customary laws value marriage as an institution unlike the emerging trend in the western world where people of age are no longer contracting marriages and prefer being in cohabiting relationships (Hibbs et al., 2001). The payment of bride wealth also puts pressure on the woman to remain in the marriage. Apart from legitimisation of the marriage bride wealth also functions to enhance, and not to diminish the status of the African woman in Africa (Shope, 2006). Presently, the determinants of how much is to be paid as marriage gifts depend on the level of the girl’s education.

The early missionaries and colonial administrators saw bride wealth as an instrument of male domination and a symbol of devaluation of the woman in society. This according to them was contradictory to Christian morality and the British sense of justice and hence became an obstacle to the legal recognition of African customary marriages (Ogbu, 1978). As a result of the influence of the colonisers who were also Christian’s missionaries Africans were converted into Christianity. The attitude of the missionaries was against payment/exchange of matrimonial gifts because it elevated the women to an inferior position in society (Ogbu, 1978) unlike the Christian community who acknowledge the value of culture and has equated the payment/exchange of marriage gifts to the African traditional culture and further supports the payment of matrimonial gifts by justifying its legitimacy by stating that dowry is paid according to the ability of the man in question. Since the end of colonialism bride wealth payment has not been easy to assess in the Francophone states like Ivory Coast where measures were introduced to eliminate African traditional forms of marriage. The main purpose was to strengthen the nuclear family at the expense of the lineage system.

Other states like Guinea, Mali, and the Cameroons have introduced less far reaching reforms in that they have incorporated certain features of the traditional marriage systems although they have not legalised bride wealth payments and have entrenched the same in their constitutions. This is in contracts to the British colonies like Nigeria where no reforms have been instituted towards dowry payments and still maintain the marriage patterns developed during the colonial days which usually recognised customary marriages and dowry payment as a common feature (Ogbu, 1978).

2 The legal and regulatory framework on matrimonial gifts/payments

International conventions/declarations that offer great significance to the subject include the Universal Declaration of Human Rights (General Assembly Resolution 217/A (III), the International Covenant on Civil and Political Rights (Resolution 2200 A(XXI)), and
The relevance of matrimonial gifts in Kenya

In furtherance to the above, the Protocol to the African Charter on Humans and Peoples’ Rights on the Rights of Women in Africa OAU Doc. Res.AHG/Res240 (XXXI) June 1995 provides for the right to a positive cultural context in article 17 which accords women the right to participate in all levels to determine the cultural policies that they so desire. The African charter on human and peoples’ Rights adopted 27th June 1981, OAU Doc.CAB/LEG/67/3 rev.5,21 LL.58(1982) which entered into force 21 October 1986 also requires state parties to ensure that no woman is discriminated upon and that their rights are protected at all times.

The CEDAW general assembly resolution 34/180 affirms that much as it recognises the inalienable rights of women it also recognises the importance of culture and tradition in shaping the thinking and behaviour of men and women in society and the significant roles they play in restricting the exercise of basic rights by women. The committee noted that there are some state parties who still have practices/measures that discriminate on women based on their norms, customs and socio-cultural prejudices and as a result the committee resolutely discourages notions of inequality between men and women as affirmed by the law.

Kenya’s periodic report to the committee of CEDAW of 2011 discussed a list of concerns and recommendations that were to uplift the lives of the women and among the concerns that were addressed were the measures to be taken to ensure equality of spouses in marriage as provided in Article 16. The report was prepared as an outcome of national forums on the issues of women’s rights in the country which was carried out by the Franciscans family in Kenya. The report did not address dowry and its implications to the woman but addressed Article 16 of CEDAW in the context of domestic violence which was a widespread vice the Kenyan women faced in the family (CEDAW/C/KEN/7, 2011) like domestic violence amongst spouses which is as a result of the women being dominated by men because of the bride price paid on their heads under customary law.

Kenya being a civil law jurisdiction recognises customary law as being part of its laws and the constitution provides for customary law unless the laws in question are repugnant to justice and morality. Cultural practices amongst the Kenyan communities differ and what is considered moral in one community may be considered immoral in another. The payment/exchange of marriage gifts attracts the question of morality amongst the African and Western cultures and it is in this regard that this paper seeks to examine the validity of practice of payment/exchange of marriage gifts and their enforceability in Kenya in light of the 2010 provisions of the Constitution. Article 45(4) of the constitution provides that parliament shall put in place legislation that recognises customary marriages whereas Article 44(3) provides that nobody is to be compelled to perform any cultural practices.

The Marriage Act No.4 2014 Laws of Kenya recognises customary marriages in Section 6 and the payment of marriage gifts in consideration of intended marriages. The act defines dowry as tokens of stock, goods, money or other property that is given or promised in consideration of intended marriages. Section 43(2) provides that where the payment of marriage tokens is required to prove existence of a marriage then such payment shall be sufficient. The Judicature Act at Section 3(2) recognises the value of customary practices and empowers the high court, the Court of Appeal and all subordinate courts to be guided by the African customary laws when determining civil cases in the instance that one or more of the parties is subject to or affected by as long as
the customs in question are not repugnant to justice and morality. The customs should also be consistent to written laws. The Magistrates Act also recognises the existence of African customary laws in Kenya and empowers magistrates in their course of duty to handle matters of customary law in its Section 7. The Kenyan courts have dealt with the issue of dowry payment and in the case of \textit{Joseph Francis Makhokha V Raphael Simiyu Wekesa and Another (2007) eKLR Civil Appeal 35 of 2007} it was held that under customary law the father had the right to claim for bride price and in death a personal representative to the estate could purse the claim. Judgment was found for the appellant and he was awarded a total of Ksh 70,000.00/= which was a summation of 13 head of cattle whose value per head was at Ksh 5000.00/= plus two goats each valued at Ksh 2500.00/=. The claim for parents allowance was dismissed since they were deceased and also the prayer for general damages was rejected.

Section 43(2) of the Kenya Marriage Act provides that where the payment of marriage tokens is required to prove existence of a marriage then such payment shall be sufficient. In \textit{BMS V MHM(2015) eKLR Kadhi's court at Mombasa Civil case No 21 of 2015}, the plaintiff sought to be paid dowry in full. She claimed that part of the dowry that had been agreed upon had not yet been paid and she annexed her marriage certificate which had been issued by Sheik Rama of Tiwi. The certificate indicated that the dowry was to be paid to the amount of Ksh 100,000.00/= in the form of furniture and the same had not yet been paid at the time of the marriage. The plaintiff however admitted that part of the dowry had been paid but she was yet to receive dowry estimated at Ksh 75,000.00/=. It was held that she was entitled to the same by the Kadhi court.

In the case of \textit{Cornelius Kaunguja M'alaine v David Kailikia M'imathiu (2007) eKLR high court at Meru, Civil Appeal 20 of 2003} which was presided by judge W. Ouko that had risen from the judgment of the district magistrates court on the 18th February 2003 in Resident Magistrates Court Case No. 6 of 2002 where the appellant had paid the dowry on behalf of his son to the respondent whose daughter the appellants son wanted to marry. The court held that it was guided by African customary law when determining civil cases by virtue of Section 3(2) of the Judicature Act which provided that in the event that one or more of the parties in the suit is subject to customary law then the same would be applied in determining the matter. Further to that, the court stated that the evidence on record showed that in the event a married woman ran away from her matrimonial home and returned to her parents home the dowry would be refunded in full if she had no children but in the instance that she had children only a half of the dowry would be refunded. In addition, evidence produced stated that in the event that a married woman died without a child only the cows would be returned and the judge found that the girl had been returned to her parents home where she had died childless and found it unconscionable to order the respondent to return the dowry.

3 Emerging issues and problems in regards to payment/exchange of matrimonial gifts

There are constitutional and human rights issues that arise in regard to payment/exchange of matrimonial gifts and they include domestic violence, sale of human beings, equality, international law lacking merit, and harmful cultural practices. These have been expounded one after the other in this section in detail.
3.1 The link between dowry payment and domestic violence

Men in the traditional African setting have the presumption that payment of bride price/wealth gives them total superiority and ownership over their brides and can do anything to them including disciplining them (Shope, 2006). Drawing the line between respect and domination has been the challenge because the men abuse their women in the context of commanding respect from their women (Shope, 2006). In 2007, Kenya submitted its periodic report to the CEDAW committee which addressed a raft of issues which comprised of domestic violence and the possible recommendations on how the vice could be curbed. This led to the assent of the Protection against Violence Act 2014 in Kenya which has officially criminalised violence against women.

In the African communities, men have been seen to dominate over women because of the marriage gifts they exchange/pay on their heads which subjects women to lose the capacity to relate to their husbands as equals and compels them to obey their husbands at all times (Cotran, 1987). One of the main factors that has contributed to domestic violence in Kenya is the patriarchal nature of society which recognises the rights of men to discipline their wives, the failure to recognise within the law offences like marital rape, the existence of a male dominated parliament which is reluctant/slow in enacting laws that would protect women from domestic violence, financial dependence of women on the men, alcoholism and drug abuse, laxity of law enforcement officers to apprehend perpetrators and poverty (Cotran, 1987). In Kenya, domestic violence takes the form of physical assault, emotional abuse, threats of violence, sexual violence and distress.

In the 11th session of general comment number 19 of CEDAW, it was pointed out that violence against women is as a result of manifestation of the unequal power relations that has been there between men and women which has in turn led to the domination over them and the discrimination against women. That it is because the payment of dowry subjects women to a subordinate position in the family. Violence against the women impacts them negatively because it results in the violation of their rights and fundamental freedoms and prevents them from enjoying their rights.

Domestic violence acts as an obstacle to the achievement of equality between sexes, development and peace. It is noteworthy to state that payment of dowry has been abolished in India which is now viewed as an illegal act but despite the abolishment the practice is still widely common in many parts of India. This was necessitated by the fact that husbands became cruel to their wife(s) and in-laws in the event that the dowry was not paid according to the proportion that they demanded. In the case of Sushil Kumar Sharma V Union of India and Ors on 19th July 2005 writ petition (civil) 141 of 2005, it was noted that men working as government officials in India sought dowry that was relevant to the market rate of the positions they held in government. This promoted cruel treatment to the bride and her family in the event that she failed to pay the dowry as per their agreements. Proponents of dowry payment would argue out that increase of cruelty is an unforeseen consequence of the laws in place and can be cured by putting in place laws to curb the vice.

3.2 The status of women in bride price/wealth negotiating

According to the African customary laws, women are not considered as equals to their male counterparts and the men dominate over them by virtue of having paid for their bride price. The irony of the situation is that the African women pride themselves in their
culture and set conditions that dowry has to be paid on their heads at the time of marriage (Meekers, 1992). In South Africa, the payment of marriage gifts forged a relationship bond among families as it marked an addition of the woman into the husband’s family. In rural, South Africa lobola (the native word for dowry) was viewed positively as it created relationships (Shope, 2006). The practice is a rich tradition in South Africa as it affirms the woman’s value in society or rather upholds her worthiness (Shope, 2006). Men who do not pay lobola are said not to respect their wives. The practice is defended on the grounds of individual human rights namely the right to dignity which is a provision in the South African constitution in Article 10 of the bill of rights. In contemporary, South Africa lobola has been used to pay for the education of the bride’s siblings or purchase of goods to improve the living standards of the bride’s family. It is no longer held as an insurance policy against the husband in the instance that the husband neglects or maltreats his wife. The whole practice has become highly commercialised because lobola is pegged on the level of the education that the bride has attained. The argument from the Western culture of payment of marriage gifts conferring more power to men in the marriage in South Africa has also been discussed that much as lobola gives the women a symbolic status in society it also materially binds them to a patriarchal authority structure. The practice of lobola is complex and the black woman is taking up more active roles in negotiating more equitable gender relations in the country and at the same time reaffirming the value of lobola as a cultural practice.

Equality refers to the state of having the same rights. The Kenya Constitution 2010 provides for equality of spouses in marriage even at the dissolution of the marriage at Article 45(3) and promotes the principle by further providing for freedom from discrimination in Article 27. In addition, the Constitution provides for national values and principles of governance in Article 10 to include equality, social justice, non discrimination and protection of the marginalised.

Kenya has adopted international law at Article2 (6) of the constitution 2010 on supremacy of the Constitution by providing that any ratified treaties/conventions will form part of the law. The Convention on Elimination of all Forms of Discrimination against Women GA Res 34/180 of 18th December 1979 which entered into force on 3rd September 1981 affirms that all human rights are equal in society and in the family. Article 16 of CEDAW provides that State parties to the convention shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family and ensure they relate on a basis of equality. The forms of families vary amongst States and irrespective of the form a family takes and whatever the legal system, custom or tradition, women in the family must be accorded equal treatment both at law and in private.

Equality for women can also be understood outside the context of family law using the approaches of formal equity or gender neutral treatment where the concept of equality is seen as a matter of gender neutral treatment in all circumstances (Davis, 1983). This model is simple in that no law may validly distinguish between a man and a woman but the model has deficiencies because historically men and women were never treated the same. Treating them the same would only be disadvantageous to the women because the women would have to conform to the men defined norms or lose ground. This model has nothing to offer women who have nothing to compete against comparable male experience by which to claim the woman’s right to identical treatment (Graycar, 1995).

The next approach known as the differences approach argues that women do not necessarily have the same experiences as men and suggests that they do not have to
The relevance of matrimonial gifts in Kenya

The approach states that women’s differences need special recognition like child bearing and it is this recognition that promotes women’s equality (Graycar, 1995). This approach assumes that the difference between men and women is a justification for the different rules and that women can be further disadvantaged because of the discriminatory practices that will be justified, e.g., exclusion from certain jobs. The commonality of this approach to the gender-neutral approach is that men have been used as the benchmark in that the gender-neutral approach requires the women to be the same as men while this approach stresses women’s differences from men but neither challenges maleness as the standard (Graycar, 1995).

The other approach used to define equality is the disadvantage approach which analyses the inequality not as an issue of whether men and women are the same or not but as a consequence of relative distribution of power between men and women (Graycar, 1995). It looks at the policies, laws and practices to determine whether they operate to maintain women in a subordinate position. The main focus of this approach is on the effects on women of a particular legal rule like the fact that women have different reproductive capacities should not lead to women’s lesser social status and limited access to paid work opportunities.

3.3 Humans for trade: commercialisation of dowry payment

Payment of dowry today has become so expensive and parents charge the exorbitant prices to pay back the money they spent on upbringing of their children. Today, payment of matrimonial gifts is seen as a form of business and has even been referred to as wife selling by critics. This position is today supported by the argument that nothing is given for free in life and therefore dowry practically was not a gift as it was perceived in the African traditional setting. This argument sustains the school of thought that dowry is a form of sale of bride to be which amounts to wife selling. The western world argues that once sold the men become powerful in the marriage and equality between the spouses cannot be achieved (Selwyn, 1979). This is not the true state of affairs because in Kenya the Marriage Act No. 4 of 2014 recognises that spouses in marriage have equal rights at Section 3(2) despite the practice of exchange/payment of marriage gifts. Even the most elite women in Kenya cherish the practice despite the international outcry that negates the practice (Shope, 2006). Despite the women’s social standing they still demand and continue to insist that for them to be married the men have to pay dowry. The paradox is that to the Kenyan woman, failure to pay dowry is the major source of shame and discredit to them.

Currently, the determinants of the amount of dowry paid are commensurate to the level of education that the wife to be has attained. If a girl is highly educated then she costs more. With the change in economic circumstances, though the decisions made in current times to a large extent do not reflect the customary law position because they still fail to protect the women’s property rights. Greed is the main driving force when determining the amount of dowry to be paid (Kuenyehia and Ofei-Aboagye, 1998). Parents charge exorbitant dowry unlike the traditional setting where dowry was given as a sign of appreciation and love to the bride’s parents. The payment signified how serious the young man was with his request to marry a girl. Today dowry is referred to as fees because the girls’ parents demand back the money they have invested in the girls
education. Dowry has become a forum for business because the amount paid helps the girl’s parents build a house or even buy luxury items like buying a car. This has brought in the change of emphasis in the meaning of dowry thereby making the practice resemble wife selling.

3.4 The place of culture and dowry payment in human rights

Harmful cultural practices are practices that erode the psychological and physical health together with the integrity of the woman. The payment/exchange of marriage gifts is linked to harmful cultural practices like female genital mutilation, wife inheritance, early marriage, widow cleansing and eviction which rob the women of their psychological and physical health and integrity. This is because the women are subjected to these conditions in order to stand a chance of getting married in the African customary setting. These practices end up meting violence towards the women making them insubordinate to the men. The Kenya Constitution 2010 at Article 2(4) provides that any law inclusive of customary law that is inconsistent with the Constitution is void to the extent of the inconsistency. The aim of the article is to protect the women from the harmful cultural practices. Article 21(3) recognises that women fall under the category of vulnerable groups within society and places a duty on all the state organs and public officers to address their needs. The right to health is provided for in Article 43(1) and the specifics of the clause are that every person has the right to have the highest attainable standard of health which includes the right to health care services. The article also safeguards the economic and social rights for the women. The Maputo Protocol at Article 2 provides for the elimination of discrimination against women. The protocol further provides for protection of women from violence in Articles 3 and 4 and the elimination of harmful cultural practices at Article 5. Violence against women impacts negatively on them as it results in the violation of their fundamental rights and freedoms and further prevents them from enjoying the same. In addition violence acts as an obstacle to the achievement of development, peace and equality and lastly violence results to the insubordination of women.

The general comment CEDAW/C/GC/31-CRC/C/GC/18 (2014) recognised that the mandates of CEDAW and the CRC overlapped and that they were to prevent, respond to and to eliminate harmful practices that occur to both women and children in society. Through its joint recommendations of the Committee No. 31 of CEDAW and general comment No. 18 of the CRC the objectives of the general comment were spelt out to be to clarify to state parties their obligations by providing authoritative guidance on legislative and policy measures to be taken to ensure full compliance by state parties to eliminate harmful practices. The rationale behind the joint general recommendation was that the committee acknowledged that harmful practices are deeply rooted in societal attitudes which result to women being regarded as inferior to men and this is evidenced in the stereotyped roles.

The committee noted that state parties to CEDAW had a duty to respect, protect, and fulfil women’s rights and that they also had the obligation to exercise due diligence to prevent acts that would impair the recognition and enjoyment of rights. The Committee called on state parties to explicitly prohibit by law and adequately sanction harmful practices in accordance with the gravity of the offence. The causes of harmful practices were described to be multidimensional and included the stereotyped sex and gender based role, the presumed superiority and inferiority of either sexes, attempts to exert control
over bodies and sexuality of women and girls, social inequalities and the prevalence of male dominated structures. It was noted that despite the efforts to combat harmful practices there still persists a high number of women who undergo harmful cultural practices and this is because some communities continue to adhere to harmful practices in an attempt to preserve their cultural identities. The Committee classified harmful practices under the general comment to constitute of the following:

1. A denial of the dignity and/or integrity of the individual and a violation of human rights and fundamental freedoms enshrined in the conventions.

2. Discrimination against women/children which is harmful insofar as they result in negative consequences to them as individuals/groups including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential.

3. Traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women/children based on sex, gender, age and other interesting factors.

4. They are imposed on women and children by family, community members, or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.

The effects of culture are realised where the family being a private entity which is dominated by the men does not go beyond the reach of the state. The customary practice of paying dowry/bride price contributes to violence against women because for a marriage to be dissolved the woman has to return the bride price that was paid on her head and in the event that she cannot return the same she is forced to remain in the abusive marriage. Cultural norms that relate to gender roles can also render women to be insubordinate to men which may make violence more likely to happen.

The practice of female genital mutilation is found amongst the Kisii, Maasai and Somali communities and is carried out on young girls from the communities. The justification is that uncircumcised girls are unclean and not suitable for marriage. This violates the girls’ right to health, security and physical integrity. Further the practice violates the right to freedom from torture and cruel and degrading treatment plus the right to life in cases of death.

Early marriages affect girls who fall under the age of eighteen years who are forced into marriage just after their completion of their passage into adulthood. This is because their bodies are not mature for reproduction it becomes a violation of their rights as per the Kenya Children’s Act No. 8 of 2001 at Section 14.

Wife inheritance refers to where a male relative of a deceased husband takes over the deceased widow as a wife whereas widow cleansing refers to the process where the widow has sex with a social outcast who is paid by the dead husband’s family to cleanse the woman of her dead husband’s evil spirit. The practices have resulted in human rights violations because a woman who refuses to undergo the practices is chased away from the home in order to avoid bad omens befalling the family. Women who undergo unprotected sexual acts risk exposure to HIV transmission and other sexually transmitted diseases alongside the destruction of their dignity, and physical integrity. The children that are begotten from a union of wife inheritance are neglected by their biological father because the widow is expected to take care of them single handedly.
Widow eviction refers to where the widow is forcibly removed from her marital home by her deceased husband’s relatives or members of the community because of cultural beliefs that women cannot own property, the failure of women to comply to some rituals like cleansing and if she has no children or lacks a male son. Lastly the widow is evicted if there is a failure to formalise a customary marriage. The practice abuses the women’s rights as it deprives them of ownership of matrimonial property, the right to accessible and adequate housing coupled with reasonable standards of sanitation.

4 Conclusions

It has been argued that marriage gifts should be treated as a form of protecting the fundamental right to human dignity. This is because the practice affirms the woman’s value in the African society or rather upholds her worthiness whereas it ensures that men’s position is held high in society and they are also respected (Shope, 2006).

Marriage gifts should also be treated as a transfer of wealth from parents to their children. This wealth gives them a start in life and especially when dowry is given to the girl it affords her the right to own separate property allowing the girl to be independent. This is considered an essential tenet for the security, growth and development of self worth of an individual (Randeria and Visaria, 1984).

According to customary marriage payment/exchange of dowry is considered a legitimate expectation and should be respected. Cultural practices usually have good roots because people generally do seek the good in life. In the instance of distortion like male dominance, we only need to think through what the value of the custom is and how to get rid of the parts that discriminate against women and hurt them.

Payment/exchange of dowry is provided for in the Marriage Act but the same lacks an enforcement mechanism. It is in this regard that I propose that the same be made enforceable by way of contract and included in the Act. The dowry contract would stipulate a standard amount of how much dowry is to be paid and a clause to state that the same is to be non refundable in the event of marriage breakdown. This would promote women empowerment and give back the practice its traditional meaning which was love and appreciation. Women would be empowered in line with the provision of the Millennium development goals which propagate for gender and empowerment.

The government can also roll out public awareness campaigns to educate people on the intended purpose of dowry payment and the need of preserving its original intention. The unintended consequences of dowry payment that have cropped up like exorbitant payments would then perhaps be done away with. The negative behaviour that is related to dowry payment like inequality between spouses, abuse, violence and financial strain on the men because of high prices would also be eradicated through the public awareness programs.

As is apparent by now, we need both the past and the present; the former to give our traditions, values, practices and the latter to expose the impact of other cultures on our own, in order to arrive at a more satisfactory type of modern African marriage. It is not a question of either the past or the present but what works best therefore the practice of paying dowry should not be done away with completely. We should indeed adopt
positive cultural content as is provided for in the protocol of the African charter on human and people’s rights on the rights of the African women which provides that women shall have the right to live in positive cultural context and to participate at all levels in determination of cultural policies as provided for at Section 17. Payment of marriage gifts is a practice that is held dear in Kenya and the domestic statutes recognise and acknowledge the same. In the western world exchange gifts during weddings are also practiced for example, the bridegrooms give their brides expensive rings (Hague and Thiara, 2009). Let us not forget the Kenyan saying that he who denounces his culture is a slave.

References


Protection Against Domestic Violence Act No. 2 of 2015.