

**BRIDE PRICE - PAVING THE WAY FOR A KILLER**  
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Kenyan men can marry or get married and divorce under any one of five legally recognized systems. There is the statutory marriage and divorce, Hindu marriage and divorce, Islamic marriage and divorce, presumption of marriage under common law as well as African customary marriage and divorce. A Kenyan man may be married under statutory law but still enter into a marriage under traditional African customary law. The numerous legal systems of marriage in Kenya coupled with the lack of a central marriage registry make it easy for men who are already married under a monogamous system to enter into polygamous unions. This is done by payment of bride price.

An African customary marriage is based on an agreement between the families of the bride and groom involved as opposed to the two individuals getting married. It is sealed by the payment of bride price by the family of the groom usually in the form of cattle or other property to the bride's family or guardian. This validates the marriage and establishes control by the bridegroom and his family over the bride.

Like most cultural practices in Africa the institution of bride price was desirable and put in place for community welfare. It was aimed at building a stable long term relationship between the families of the bride and groom. However, due to modern developments on the medical scene and the unique features of bride price such as polygamy, domestic violence, wife inheritance, property rights, and patriarchy, the institution of bride price may have outlived its usefulness. Today, bride price is used to further selfish individual needs of men and for men to control women to their social, emotional and economic detriment. It is responsible for the majority of women's diminished power in economic, political and sexual negotiations and contributes heavily to the spread of the Human Immunodeficiency Virus (HIV) which eventually leads to development of Acquired Immune Deficiency Syndrome (AIDS). According to statistics released by the Joint United Nations Program on HIV/AIDS (UNAIDS) and World Health Program (WHO), more than half the number of People Living With HIV/AIDS (PLWHAS) worldwide are women.<sup>1</sup>

When the first case of HIV was diagnosed in 1983, African governments considered HIV and AIDS a foreign problem. Today, HIV has spread around the world, causing one of the most severe global epidemics of modern times.<sup>2</sup> By July 2002, according to the Kenya Task Force on Legal Issues, over 36.1 million people worldwide were HIV positive and 21.8 million people had succumbed to AIDS. The pandemic is responsible for an estimated 1.1 million orphans in Kenya alone and on average 500 – 700 Kenyans die of AIDS related complications on a daily basis.<sup>3</sup> While significant gains have been made in the treatment of HIV/AIDS in developed countries, 95% of infected people live in the developing world.<sup>4</sup>

Since August 1984 when the first case of HIV – AIDS was diagnosed in Kenya, over 1.5 million Kenyans have died of AIDS and about 300,000 are infected with the virus each year.<sup>5</sup> The AIDS pandemic is all encompassing and so complicated that it cannot be contained without looking into all aspects of human life.

One aspect of life that must not be ignored is the culture of polygamy in the traditional African customary marriage. It is generally accepted in Africa that customary marriages are potentially polygamous. Although in recent years, harsh economic realities have brought about a gradual shift towards monogamy, polygamy is still practiced across the board and men who marry customarily are generally free to have as many other wives as their resources (capability of paying bride price) can allow. In the words of Eugene Cotran commenting on polygamy among the Kikuyu of Kenya,

*'A man may enter into any number of marriages, provided that the subsequent marriage is otherwise valid... the consent of the first or senior wife is not necessary before the husband takes a subsequent wife.'*

This position is not only true for the Kikuyu. It applies to most Kenyan communities and it of course clears the way for men married customarily to have extra – marital affairs as well as additional marriages. It is a

practice that carries serious health implications both for the men involved as well as their women and children because the number of sexual partners a man has is directly proportional to the degree of risk of contacting STDs and AIDS by himself and his wife or wives. Children in such marriages run the risk of being orphaned and left to fend for themselves from tender ages.

Although a man's conduct may expose his wife (or wives) to the risk of infection, the complaint of a husband's adultery is not a legitimate one under African customary law. A woman is bought at a price and enters into a potentially polygamous union. Anything she may have to say which may put restrictions on the polygamous nature of the union is of no consequence and unlikely to be entertained either by her husband or his family.

Traditionally, payment of bride price relegates the status of a woman to that of a minor. A woman is under the authority of her parents until she gets married. After payment of bride price, this responsibility is transferred to her husband or her husband's relatives in his absence and a married woman belongs to her husband's clan. She is not a partner with her husband but a chattel with specific duties. Under customary law, a woman does not have the capacity to make decisions without the consent of her husband, father or other male kin.<sup>7</sup>

She becomes part of the property of her new home and is not even involved in making decisions about issues that concern her or her children even regarding such important matters as burial or use and sale of family property. Her role in the new family is limited to taking care of her husband, working on the farm and bearing children for her husband's family. According to a research conducted by UNAIDS in March 2003, married women are traditionally regarded as *'minors who ought to be chastised as children.'*<sup>8</sup>

Wife beating is therefore not regarded as a crime but rather a disciplinary measure. For this reason, a complaint from an unhappy wife would invite violence from her husband which is widely tolerated in Kenya. It is not treated even by courts of law with the same seriousness as other types of assault and women who find themselves in abusive relationships often have nowhere to turn. According to customary norms, no wrong has been done and according to the law it is a domestic matter outside their jurisdiction. The attitude of Kenyan police officers as well as courts does not deter men from domestic violence since their stand is generally not to interfere in domestic matters particularly where a man is 'just disciplining or chastising his wife'. Domestic violence has thus helped to keep the cornerstones of the institution of bride price in place as a woman is a man's property and the man is free to do as he deems fit with her. Women are not able to demand faithfulness or safe sex and condom use in traditional African marriages and the concept of marital rape is unknown to African customary law. African women are therefore exposed to the risk of infection with Sexually Transmitted Diseases (STD's) and AIDS.

Besides the health risks involved, polygamous marriages are an abuse of women's right to equality with men in marriage. Although polygamy and multiple sexual partners of a spouse may not lead to infection, it spells serious emotional and financial implications for the women and children in such relationships and is not in their best interests. It is a common trend for children to suffer deprivation and neglect due to the division of resources that comes with polygamous marriages. Many of them have to go through life deprived of basic necessities.

As opposed to the western marriage, the African marriage is a transaction between two families. In recent years, there has been a move towards greater flexibility and freedom among women to choose their own husbands, but family approval and involvement in negotiating marriages is still highly valued<sup>9</sup>. Sometimes, the marriage negotiations involve wealthy old men and poorer families who marry off under-age girls against their best interests, without seeking their consent and in contravention of their rights as provided by the Convention on the Rights of the Child. Because of the bride price that wealthy suitors can pay to poor families, young girls are married off to older men who have the resources to pay their bride price and who may already be infected. This practice is discriminatory against the girl child since there is no similar or corresponding practice against boys. Indeed it is not unusual to marry off a girl and use some of the income to educate and provide for her brother(s) needs.

Due to their tender age, young girls who find themselves in such relationships find it difficult to negotiate safe sex or faithfulness. This practice of early marriages for girls not only interferes with the girl's right to education but also paves the way for her social, economic and political marginalisation and contributes to the spread of AIDS. It is reported that in sub-Saharan Africa, prevalence of AIDS among teenage girls in some countries is five times that of teenage boys. Indeed in some African countries, about 6-12% as many young women aged 15-24 are living with AIDS compared to 3-6 % of young men. Most of these infections occur as a result of heterosexual intercourse.<sup>10</sup>

Another aspect of bride price and its contribution to the spread of AIDS is that in the African customary marriage when bride price is paid, a woman loses the right to own property and hence all property that she may have acquired before marriage or that she will acquire thereafter belongs to her husband. In the words of a senior chief in Ngong, Kajiado district,

*“ a woman and the cows are a man's property ”*<sup>11</sup>

This is the concept of marriage in African society and the reason why payment of bride price exacerbates property rights violations against African women. The issue of property ownership contributes to the spread of STD's and AIDS. Being a largely patrilineal society,

*‘...traditionally, a divorced woman would automatically lose custody of her children. In addition to that, she loses all property and may only keep her pots and personal clothing’*<sup>12</sup>.

Since women who contemplate separation or divorce have to contend with being sent away empty handed, this makes them stay in abusive relationships or those that carry the threat of infection and end up being infected with STDs and AIDS.

Although a girl belongs to her parents until marriage and thereafter to her husband's family, when it comes to property ownership she is neither a full member of her natal nor her marital clan. She therefore does not inherit from her parents because her husband's family is supposed to provide for her. In the event of separation or divorce, a woman is sent back home empty handed for her family to provide for her and refund the bride price, which does not usually happen. Indeed, the whole issue of returning of the bride price discourages many women from leaving abusive marriages particularly when they know that their families will not be able to return the bride-price.

Bride price not only impedes women from getting a share of family property upon the husband's death or divorce, it also means that the woman and any property she acquires or children she bears belong to her husband and his family. Indeed in most Kenyan communities, *unless the dowry is returned to the husband, he can even take children the woman has with other men.*<sup>13</sup>

By the time a man is dying of AIDS, his wife or wives are also usually infected with the deadly virus. It is therefore a double tragedy for women with AIDS in Kenya, when their homes, lands and other properties are taken by the relatives of their husbands. They lose assets they could use for medical care and also find themselves destitute, chased out of their matrimonial homes and unwelcome in their natal homes. So far, the law does not provide for recognition of spouse rights in division of property during times of death or separation of spouses. A 1985 bill which would have created among other things a uniform law recognizing equal spouse rights in division of property was shelved when members of parliament said it interfered with men's ability to chastise their wives!<sup>14</sup> Discrimination against women in property rights issues constitutes an abuse of human rights of women as provided for by the Convention on Elimination of All Forms of Discrimination Against Women and exacerbates the already unimaginable havoc caused by HIV/AIDS .

Although most cultural practices in Africa had the welfare of the community at heart and were generally positive in providing social security for the vulnerable these have been abused and misdirected for the benefit of selfish individual needs. One such cultural practice is wife inheritance. Upon death of her husband, a woman married the customary way by payment of bride price cannot stay in the matrimonial home or on the land unless cleansed and inherited. The argument is that

*“Women have to be inherited to keep any property after their husbands die. They have access to property because of their husband and lose that right when the husband dies.”<sup>15</sup>*

Their access to property is restricted to the lifetime of their husbands. After his death they cannot marry outside the family because the husband’s family had bought them with a price – bride price. They are therefore the property of their clans and must be inherited. Wife inheritance is an easy way to access the property of the deceased since women who resist inheritance are sent out of the household. The tragedy is that after being inherited, ownership of all the family property passes on to the inheritor who is the new head of the household. According to one widow interviewed by the Human Rights Watch in Kisumu,

*‘inheritors aren’t supposed to give, they’re only supposed to take’<sup>16</sup>*

The practice of wife cleansing goes hand in hand with wife inheritance. Wife cleansing usually involves the widow having sex with a social outcast, although in recent years the trend has been to seek the services of a professional ‘wife cleanser.’ Reports indicate that one in three widows in Western Kenya is forced to undergo the cleansing ritual.<sup>17</sup> The sex link in burial rites of some Kenyan communities and the practice of wife inheritance have contributed heavily to the spread of AIDS. Condoms are not used in cleansing rituals partly because the cleansing is not considered complete unless it is skin to skin and partly because the circumstances surrounding the entire ceremony make it difficult for a woman to demand the use of a condom. Self styled professionals in the area of ‘cleansing widows’ have been known to cleanse up to a hundred women in the course of their ‘practice’, one after another without taking any safety precautions for their sake or for the sake of the women they ‘cleanse’ or for the sake of their own wives. This is not only a sure way to spread the AIDS virus, it is a human rights tragedy. The women’s right to the highest attainable standard of physical and mental health as provided for by Article 25.1 of the Universal Declaration on Human Rights is abused. All this happens because of bride price and in the final analysis, after payment of bride price a woman has no control over her life or health. She lives at the whims of her husband and his family.

Women are financially and socially challenged when it comes to divorce for many reasons. Perhaps the most important is the fact that the woman’s family is required to return dowry after divorce and may not be in a position to do so. There is also the fact that as with payment of bride price, its return on dissolution of marriage requires the consent of both families and involves protracted procedures and ceremonies to be conducted by the families. This explains the reason why divorce rates remain low even though many women are barely getting by in abusive and risky relationships. This and the failure to ensure equal property rights upon separation or divorce discourage women from leaving abusive marriages.

Wife inheritance may originally have been well meaning and protective but today it is predatory, exploitative and potentially fatal. It has resulted in gross human rights abuses against women and children and brought about serious health concerns in this era of HIV and AIDS. The time has come to strike a balance between individual rights to cultural identity and public health concerns. We need to study and understand the institution of bride price, the link to culture and traditional practices and its implications for women and children. It is only with a complete understanding that we can move to legislate against the entire practice or those aspects of it that constitute human rights abuses and lead to such social evils as the spread of HIV/AIDS.

### **Recommendations**

The criminal penalties specified in our laws for inter-meddling with estates of deceased persons are insufficient and do not deter the plunder that goes on when a husband and father dies. The law should make it criminal to deal with property of a deceased person before taking out letters of administration to deter people who move to grab property upon death of a husband. Harsh prison sentences and heavy fines would be useful towards this end.

Although our constitution outlaws discrimination on the basis of sex, this is widely practiced particularly when it comes to personal and customary law. The new constitution should make specific provision for legal protection of women's property rights. The law should specifically provide for equal spouse rights in division of matrimonial property during separation or divorce. This will ensure that women are better placed to take care of themselves and their children when such situations arise. Together with this, there is need to promulgate legislative policy instruments that regulate and protect the Human rights of women and children in social relations such as marriage, to protect women from domestic violence in all its forms.

HIV/AIDS thrives alongside poverty. The government should pursue policies that promote the economic status of women in order to give them power over their lives and enable them to resist situations that put them at risk of HIV infection.

Succession laws should be made easier and more accessible to poor and illiterate women, and the process of obtaining letters of administration should be made cheaper and faster to assist widows and orphans who are ignorant, poor and more vulnerable in matters of succession and inheritance.

The general public should be adequately informed about HIV/AIDS and to this end prevention, education, information and communication campaigns should be carried out on a countrywide basis so that Kenyans especially those in the rural areas can have the necessary information to shun cultures and practices that spread HIV/ AIDS. This is one area where NGOs and Community Based Organizations (CBOs) can play a significant role because of the direct contact that they have with vulnerable populations and their unique ability to lobby and influence public policy.

Although the intentions may have been noble, payment of bride price in Kenya today presents a myriad of challenges to women exposing them and their children to human rights abuses and the risk of infection to HIV/AIDS. The time has come to take a stand on whether bride price has outlived its usefulness or not.

#### **Footnotes**

- 1) AIDS epidemic update, Joint United Nations Program on HIV/AIDS (UNAIDS), and World Health Program (WHO) December 2002 at pp 18
- 2) The business response to HIV/AIDS: Impact and lessons learnt. Joint United Nations Program on HIV/AIDS (UNAIDS) 2000 pp 7
- 3) Republic of Kenya Report of the Task Force on Legal Issues Relating to HIV and AIDS. Office of the Attorney General and National Aids Control Council July 2002 at pp 1
- 4) The business response to HIV/AIDS: Impact and lessons learnt. Joint United Nations Program on HIV/AIDS (UNAIDS) 2000 pp 66
- 5) Republic of Kenya Report of the Task Force on Legal Issues Relating to HIV and AIDS Office of the Attorney General and National Aids Control Council July 2002 at pp 2
- 6) Restatement of African Customary Law; Kenya. Volume 2 Eugene Cotran at pp 10
- 7) A situation analysis, UNICEF – Harare, 1994 at pp 52
- 8) Double standards: Women's property rights violations in Kenya Human Rights Watch at pp 9
- 9) Ibid at pp 27
- 10) AIDS epidemic update, Joint United Nations Program on HIV/AIDS (UNAIDS), and World Health Program (WHO) December 2002 at pp 18

- 11) Wilson Tulito Molill , Senior Chief Ngong. October 25 2002 Interview by the Human Rights Watch in Double standards: Women's property rights violations in Kenya at pp 33
- 12) A situation analysis, UNICEF – Harare, 1994 at pp 52
- 13) Double standards: Women's property rights violations in Kenya HRW pp 27
- 14) Janet Kabeberi – Macharia. Women, Laws, Customs and practices in East Africa: Laying the foundation (Nairobi: Women and Law in East Africa) pp 83-84
- 15) Wambui Kanyi, Collaborative Center for Gender and Development. October 27 2002 Interview by the Human Rights Watch in Double standards: Women's property rights violations in Kenya at pp 12
- 16) Double standards: Women's property rights violations in Kenya HRW pp 21
- 17) Ibid at pp 13