REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E035 OF 2023

–BETWEEN–

FATUMA ATHMAN ABUD FARAJ ..... APPELLANT

–AND–

RUTH FAITH MWAWASI ..... 1ST RESPONDENT
JUDITH MALELE MWAWASI ..... 2ND RESPONDENT
MARLIN CORAM POWNALI ..... 3RD RESPONDENT

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*(Being an appeal from the Judgment of the Court of Appeal at Mombasa (**Gatembu, Nyamweya & Odunga, JJ. A**) delivered on 10th November, 2023 in Civil Appeal No. E043 of 2022)*

Representation:

Ms. Fatuma Athman Abud Faraj the Appellant
(*In person*)

Mr. Joseph Munyithya for the 1st & 2nd Respondents
(*Munyithya, Mutugi, Umara & Muzina Company Advocates*)

No appearance for the 3rd Respondent

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The appeal before us presents a question that sits at the intersection of religious pluralism and the right to equality. It arises from a dispute over the right of children to inherit under the Muslim law, although born by a deceased Muslim parent but out of

wedlock, and whether, such children may be excluded from benefitting from the Estate of a deceased Muslim parent. In other words, it invites this Court to consider whether such exclusion, though grounded in Muslim law, is compatible with the Constitution. More specifically, this Court has been called upon to interpret the scope of Article 24(4) of the Constitution, which allows application of Muslim law before the Kadhi's Court in matters of personal status, marriage, divorce, and inheritance for parties who profess the Islamic faith. The appeal is dated 14th December, 2023 and is anchored on the Court's appellate jurisdiction under Article 163 (4)(a) of the Constitution.

B. BACKGROUND

(i) Factual History

[2] Salim Juma Hakeem Kitendo (the deceased) died intestate on 23rd February, 2015 in Tanzania. Subsequently, on 20th May 2015, the appellant filed succession proceedings before the Kadhi's Court in Mombasa being **Succession Cause No. 92 of 2015** seeking distribution of the deceased's Estate under Islamic law. In that regard, she named herself and her four children as the only heirs/beneficiaries to the said Estate. In particular, the appellant averred that she solemnised her marriage with the deceased under Islamic law on 4th August, 2006 and thereafter, the union was blessed with four children.

(ii) Litigation History

(a) At the High Court

[3] More or less at the same time, the 1st respondent, describing herself as the deceased's widow, and her sister, the 2nd respondent, also filed succession proceedings albeit before the High Court at Mombasa being **HC Succession Cause No. 200 of 2015**. Their petition was premised on the grounds that the deceased and the 1st respondent commenced cohabitation as husband and wife in 2000. During the said

cohabitation they were blessed with four children namely, SJ born on 14th July, 1998; LK born on 8th October, 2003; HK born on 26th November, 2006; and TK born on 12th September, 2007. Subsequently, that the 1st respondent converted to Islam and was issued with a conversion certificate dated 12th July, 2011 bearing the name Rubi Imani Mwawasi. Further, following her conversion, they celebrated an Islamic marriage on 11th December, 2011. According to the 1st respondent, during the celebration of the said marriage, the presiding Kadhi insisted that she should be given a Swahili name hence her name appears as Warda Imani Mwawasi in the marriage certificate. Likewise, the 1st and 2nd respondents listed the 1st respondent and her four children as the only heirs/beneficiaries to the deceased Estate. Ultimately, they sought letters of administration over the deceased's Estate as well as distribution of the same.

[4] On the other hand, upon learning of the 1st and 2nd respondents' petition, the appellant lodged an objection to the grant of letters of administration to the said respondents, an answer to their petition, and a cross petition for the letters of administration over the deceased's Estate. In addition, the 3rd respondent who also claimed to be the deceased's widow was joined in the High Court proceedings as an interested party on 16th August, 2016. Her position was that she cohabited with the deceased as husband and wife from 2011 until 7th July, 2013 when she converted to Islam and celebrated their marriage before the Kadhi. She averred that their union was blessed with one child, HM, born on 19th December, 2013. Subsequently, the succession cause before the Kadhi's Court was transferred and consolidated with the High Court matter.

[5] The appellant maintained that only her children and herself were the legitimate heirs of the deceased. Towards that end, she contended that the 1st respondent was not married to the deceased based on the discrepancy of the names that appear in the conversion and marriage certificates she produced. In her view, the marriage certificate which bore the name Warda did not refer to the 1st respondent. What was more, the

appellant claimed that pursuant to investigations, the birth notification obtained from the hospital where the eldest son of the 1st respondent, SJ, was born clearly demonstrated that he was not the deceased's biological son. In any event, she posited that the other three children of the 1st respondent were born out of wedlock and/or prior to the celebration of the 1st respondent's alleged Islamic marriage with the deceased. As a result, she maintained that under Muslim law, the three children were considered illegitimate and could not inherit from the deceased.

[6] Pertaining to the 3rd respondent, the appellant challenged the legality of her marriage to the deceased. She contended that the 3rd respondent had celebrated a civil marriage with CP, a foreigner, prior to her alleged cohabitation and subsequent Islamic marriage to the deceased. Furthermore, that the civil marriage was still subsisting at the time she purported to celebrate an Islamic marriage with the deceased. Therefore, that for all intent and purposes, the 3rd respondent's alleged marriage to the deceased was null and void. Besides, the appellant submitted that the 3rd respondent had been charged with the offence of bigamy vide **Criminal Case No. 515 of 2017** thus confirming the fact that she was not lawfully married to the deceased. As for the 3rd respondent's child, the appellant maintained that since he was born about 6 months after the alleged Islamic marriage with the deceased, the said child was equally considered illegitimate under Muslim law.

[7] On her part, the 1st respondent reiterated her explanation as to why her marriage certificate did not bear the same names as her conversion certificate which was first in time. In other words, she maintained that the name Warda which appears on her marriage certificate was given to her during her Islamic marriage ceremony pursuant to the direction of the presiding Kadhi. She went on to assert that the appellant's marriage with the deceased had been dissolved since not only had the deceased given the appellant '*talaka*' –an expression of divorce- on 6th November, 2013 but the appellant had also instituted divorce proceedings before the Kadhi's Court against the

deceased being **Civil Suit No. 245 of 2013** seeking dissolution of their marriage. Moreover, the 1st and 2nd respondents posited that the fact that the appellant had also instituted a suit against the deceased in the Children's Court at Tononoka, **Children Case No. 320 of 2014**, seeking maintenance for her children lent credence to the claim that they were no longer a married couple. In totality, the 1st and 2nd respondents denied the appellant's allegations and maintained that the 1st respondent and her children were entitled to benefit from the deceased's Estate.

[8] In response to the 1st and 2nd respondents, the appellant denied that her marriage to the deceased had been dissolved. She claimed that while she had instituted divorce proceedings and maintenance for her children, that did not dent her marriage as the case was filed due to a misunderstanding between them, which was resolved before the conclusion of the said cases.

[9] As for the 3rd respondent, she acknowledged her civil marriage to CP but averred that he had deserted her for a period of more than 7 years and as such, the law permitted her to remarry. Therefore, she maintained that her marriage to the deceased was valid. In any event, the 3rd respondent stated that the criminal case, **Criminal Case No. 515 of 2017**, wherein she was charged with bigamy had since been withdrawn.

[10] At the hearing, the parties gave oral testimonies and called witnesses in support of their respective cases. The High Court (*Onyiego, J.*) found that the dispute turned on the determination of *the applicable law pertaining to the deceased's Estate; who the widows to the deceased are; who the bona fide beneficiaries of the deceased's Estate are; what entails or forms part of the deceased's Estate; and distribution of the Estate*. By a judgment dated 25th March, 2022, the trial Judge held that ***the applicable law to the deceased's Estate was Muslim law as long as it was not repugnant to justice and morality since the deceased was a Muslim at the time of his demise***.

[11] Concerning the deceased's widows, the trial court found that firstly, the appellant's evidence that she had abandoned the divorce proceedings following reconciliation with the deceased was not controverted. Consequently, the trial Judge found that the appellant's marriage to the deceased had not been dissolved and more so, in the absence of a divorce decree to suggest otherwise. The trial Judge found that, the appellant was the deceased's widow and entitled to benefit from his Estate. Secondly, with respect to the 1st respondent, the trial court was satisfied with her explanation for the discrepancy of her name on the conversion and marriage certificates. In that regard, the trial Judge held that the names therein referred to the 1st respondent, and she was equally entitled to the deceased's Estate by virtue of being his widow. Thirdly, the trial court found that the 3rd respondent lacked the capacity to enter into an Islamic marriage with the deceased due to her subsisting civil marriage to CP. Accordingly, the trial Judge declared the 3rd respondent's marriage to the deceased a nullity.

[12] Moving on to other beneficiaries to the deceased's Estate, it was the High Court's finding that there was no dispute concerning the entitlement of the appellant's children to the Estate on account of being the biological and legitimate children of the deceased under Muslim law. Rather, the court found that the contest lay with the legitimacy of the 1st and 3rd respondents' children as heirs of the deceased. In that regard, the trial court appreciated that under Muslim law children born out of wedlock are deemed as illegitimate and incapable of being heirs of a deceased Muslim man. However, the trial Judge held that where a Muslim man during his lifetime sires a child out of wedlock, such a child should be treated as a dependant and/or beneficiary to his Estate. This is because the trial court opined that such a child should not be prejudiced because of his/her parents' choices and the consequences thereof.

[13] Be that as it may, the learned Judge held that what was in issue as far as the 1st and 3rd respondents' children were concerned was their paternity. Particularly, since they

were born prior to the celebration of an Islamic marriage between their respective mothers and the deceased. To that extent, and to establish paternity, the Judge ordered for DNA testing of the said children save for the 1st respondent's eldest son, SJ, using samples from the appellant's children, whose paternity was undisputed. As for SJ, the trial Judge found that he was not the deceased's biological child and therefore, was not entitled to his Estate. His finding was based on SJ's birth notification which indicated another person other than the deceased as his father coupled with the fact that he was born on 14th July, 1998 prior to the 1st respondent's cohabitation with the deceased which commenced in 2000.

[14] Based on the foregoing, the learned trial Judge issued letters of administration jointly to the appellant and the 1st respondent, and directed the distribution of the deceased's Estate under Islamic law to await the DNA results. In the end, the trial court issued *inter alia* declarations and orders that:

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> a. ***The appellant and the 1st respondent are widows of the deceased and therefore, entitled to a share of the Estate in accordance with Islamic sharia law.***
> b. ***The 3rd respondent's marriage to the deceased is null and void hence she is not a widow to the deceased.***
> c. ***The appellant's children being children born within wedlock are heirs and entitled to the deceased's Estate in accordance with the Islamic sharia law.***
> d. ***The 1st respondent's child known as SJ is not a beneficiary of the Estate as he is not recognized as the deceased's heir or dependant.***
> e. ***The 1st and 3rd respondents' children whose paternity is in dispute shall be subjected to a DNA test after extracting***

samples from their bodies and compared with those extracted from the bodies of at least two of the appellant's children whose paternity is not in dispute.

...

***g. Parties to agree on which of the two children of the appellant will donate DNA samples for examination before a* mutually agreed laboratory...”**

(b) At the Court of Appeal

[15] Aggrieved with High Court's decision, the appellant filed an appeal in the Court of Appeal, **Civil Appeal No. E043 of 2023**. The gist of her appeal was that the trial court erred by, finding that the 1st respondent was married to the deceased; disregarding the position of Muslim law on illegitimate children; and directing DNA testing of the 1st and 3rd respondents' children to establish their paternity. Similarly, the 3rd respondent lodged a cross appeal challenging the trial court's decision on the validity of her marriage to the deceased, and DNA testing.

[16] The Court of Appeal (*Gatembu, Nyamweya & Odunga, JJ.A*) in a judgment dated 10th November, 2023 framed issues for determination as follows: *whether the learned Judge was correct in finding that the 1st respondent was validly married to the deceased at the time of the deceased's death; whether or not under Muslim law children born out of wedlock are entitled to benefit from the Estate of their deceased father; whether the 1st respondent and her children were entitled to benefit from the Estate of the deceased; whether it was proper for the learned Judge to direct that in determining the paternity of the children whose paternity was in dispute DNA samples be taken from the said children and the children of the appellant; and whether the 3rd respondent and her child were entitled to benefit from the Estate of the deceased.*

[17] The Court of Appeal affirmed the trial court's finding on the 1st respondent's marriage to the deceased and her entitlement to his Estate on the basis that there was nothing to justify interference with the same. Likewise, the appellate court found that the 3rd respondent lacked capacity to enter into a subsequent Islamic marriage with the deceased while her civil marriage to CP was still subsisting.

[18] On the issue of the entitlement of the 1st and 3rd respondents' children to the deceased's Estate, the appellate court began by noting that no appeal had been filed by the 1st respondent challenging the High Court's finding that her first born, SJ, was neither the deceased's biological child nor entitled to his Estate. Accordingly, the court did not address itself on that finding. Based on its interpretation and application of Articles 27 and 53 of the Constitution, the court held that it would amount to unfair and unjustified discrimination to find that on the one hand, children born during the subsistence of a marriage are entitled to benefit from the Estate of their deceased's father. And on the other hand, that those born out of wedlock by the same deceased father during cohabitation but before solemnization of marriage were not entitled to his Estate. Therefore, the appellate court held that it could not countenance any practice that discriminated against children based on the marital status of their parents.

[19] The Court of Appeal went on to fault the trial court for issuing orders of DNA testing because none of the parties had made such an application and there was no basis for such an order. In any event, the learned Judges held that there was uncontroverted evidence that three of the 1st respondent's children as well as the 3rd respondent's son were born during their cohabitation with the deceased. Moreover, that the deceased treated the said children as his own during his lifetime. Consequently, the court was of the considered opinion that even if the paternity of the said children was in dispute, they would be entitled to benefit from the deceased's Estate as dependants.

[20] Ultimately, the Court of Appeal allowed the appeal to the extent that it set aside the High Court's order for DNA testing of the 1st and 3rd respondents' children, and substituted the same with an order that the 1st respondent's children (save for SJ) as well as the 3rd respondent's son are entitled to benefit from the deceased's Estate. The court further remitted the matter back to the High Court for the determination of the respective entitlements of the beneficiaries of the deceased's Estate.

(c) At the Supreme Court

[21] Undeterred, the appellant has filed this second appeal challenging the Court of Appeal's decision on a number of grounds, which can be condensed as follows; the learned Judges of Appeal erred by -

i. *Failing to appreciate that the rights and fundamental freedoms under Article 27 of the Constitution are not absolute and certain limitations have been imposed thereon by Article 24 in relation to persons who profess the Islamic faith, in matters relating to personal status, marriage, divorce and inheritance;*

ii. *Failing to appreciate that in light of the express qualification under Article 24(4) of the Constitution, a court has no jurisdiction to limit the application of such qualification when determining the application of Muslim law to the deceased's Estate;*

iii. *By interpreting Article 27 of the Constitution in a manner that negates Article 24(4);*

iv. *Failing to apply the Muslim law of inheritance which was the personal law of the deceased as required under Section 2(3) of the Law of Succession Act;*

v. *Directing that the 1st and 3rd respondents' children are entitled to benefit from the Estate of the deceased either as dependants or beneficiaries when there is in fact no classification of inheritance by "dependants" in Islamic law; and*

vi. *Finding that the Muslim law of inheritance is repugnant to the right to equality as enshrined in Article 27 of the Constitution.*

[22] Based on the foregoing, the appellant seeks the following reliefs: -

a) *The appeal be allowed;*
b) *The Judgment and Order of the Court of Appeal delivered on 10th November, 2023 be set aside;*
c) *The Judgment and Decree of the High Court dated 25th March, 2022 be set aside and substituted with an order that the 1st and 3rd respondents' children are not entitled to inherit from the deceased;*
d) *Any other order or relief as the Court may deem fit and just to ensure that law, order and constitutionality is observed; and*
e) *Costs of the appeal be awarded to the appellant.*

C. PARTIES SUBMISSIONS

(i) The Appellant's Submissions

[23] The appellant, appearing for herself at the hearing of the appeal, adopted the written submissions dated 14th December, 2023 and went on to make oral highlights. She asserted that the right to equality and freedom from discrimination as enshrined under Article 27 of the Constitution is not absolute. Rather, it is limited by virtue of Article 24(4) to the extent strictly necessary for the application of Muslim law to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance. Citing ***S Vs Makwanyane and Another*** 1995 (2) SACR 1

and ***Shollei Vs Judicial Service Commission and Another*** [2022] KESC 5 (KLR), she posits that such limitation is reasonable and justifiable as it relates to the inheritance of a deceased Muslim which has to be in accordance with Quranic principles. In her view, the Court of Appeal's decision amounts to rewriting the Constitution as it subjected the interpretation of Article 24(4) to a repugnancy yardstick, which the Constitution itself does not impose. In any event, she claimed that the appellate court has no power to amend the Constitution to give effect to what it believes to be public interest. To bolster that line of argument, reference is made to ***Bongopi Vs. Council of the State, Ciskei*** 1992 (3) SA 250 and ***Re Wakim*** (1999) 198 CLR.

[24] The appellant further urges that the Court of Appeal ought to have interpreted Article 24(4) in the manner prescribed under Article 259 of the Constitution. Additionally, that the appellate court should have considered the peculiar historical context to unravel the issues raised while interpreting Article 24(4) of the Constitution on the place of Muslim law in the Kenyan legal context. Relying on the Final Report of the Constitution of Kenya Review Commission (CKRC), she submits that there was a clear intent to exempt the application of Muslim law from Article 27 to the extent necessary.

[25] It is furthermore the appellant's position that the Court of Appeal failed to apply Muslim law to her case as required by Section 2(3) of the Law of Succession Act. In that context she faults the appellate court for equating Muslim law to a cultural practice whereas it is recognised under Articles 24(4) and 170 as being applicable to Muslims on matters relating to personal status, marriage, divorce or inheritance. According to her, personal law is a legitimate basis for differentiation or inequality of treatment which does not *per se* amount to discrimination. To that extent, the appellant submits that there is no classification of heirs known as dependants in Islamic law, which is a

creation of Section 29 of the Law of Succession Act. Furthermore, the appellant asserts that children who were not born in a lawful Islamic marriage have no right to inherit from their biological father. In that regard, the ***Principles of Mohammedan Law by Dr. (Mrs.) Nishi Patel 1995 CTS Publication Cap XIII*** is cited.

(ii) The 1st and 2nd Respondents' Submissions

[26] In opposing the appeal, the 1st and 2nd respondents reiterate their position in the superior courts below and support the Court of Appeal's decision. Making reference to ***CKC & another (Suing through their mother and next friend JWN) Vs ANC*** [2019] KECA 354 (KLR), the respondents urge that the Court of Appeal therein found that children born out of wedlock are entitled to inherit from the Estate of their late Muslim father. In doing so, the appellate court appreciated, rightly so, in their view, that firstly, Muslim law is a moral doctrine at whose heart lies the values of love, care, justice and kindness. Secondly, that in interpreting the Quran-inspired law, regard must be given to the Quran's moral teaching as a whole. Thirdly, that Muslim law is dynamic and adapts to evolving social, political, cultural and economic conditions and realities, and that not all rules of inheritance are rigidly fixed for all times since the development of Muslim jurisprudence continues to be a search for the good law to be applied in differing times and situations.

[27] They further submit that the common thread running through the UN Convention on the Rights of a Child, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, and the UN Convention on the Elimination of All Forms of Discrimination Against Women is that they prohibit discrimination against women and children on various grounds such as birth or the parents' status. Further that, the said instruments demand that the best interest of a child should be taken into account in making any determination in matters involving that child. As far as they are concerned, the Court of

Appeal therefore arrived at a progressive finding on the rights of children to inherit the estate of their Muslim parent.

[28] The 3rd respondent neither appeared in person nor was she represented in the appeal before this Court despite having been served. Equally, no submissions were filed by her or on her behalf.

D. ANALYSIS

[29] Upon careful consideration of the pleadings, the impugned judgment, and the written submissions filed and highlighted by the parties, we have identified the following issues as arising for our determination in this appeal:

i. *Whether this Court has jurisdiction to entertain the appeal;*
ii. *Whether the Court of Appeal improperly limited the application of Article 24(4) of the Constitution, and in doing so, misconstrued the relationship between Articles 24(4) and 27 of the Constitution;*
iii. *Whether the Court of Appeal failed to give effect to the mandatory application of Muslim law as provided under section 2(3) of the Law of Succession Act; and*
iv. *What orders should issue?*

i. Whether this Court has jurisdiction to entertain the appeal.

[30] Although the respondents did not challenge the jurisdiction of this Court to entertain the appeal, it is now well established that this Court has a duty to independently satisfy itself that a matter placed before it for hearing and determination properly invokes its jurisdiction as prescribed by the Constitution. In that regard, we note that this appeal is brought as of right under Article 163(4)(a) of the Constitution, which provides that an appeal shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. In

Nduttu & 6000 Others Vs Kenya Breweries Ltd & another [2012] KESC 9 (KLR), this Court clarified the threshold to be met under Article 163(4)(a), stating**:**

> ***"...the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a)."***

[31] Accordingly, it is well settled that a bare assertion by a party that an appeal is founded on constitutional interpretation or application is not sufficient to invoke this Court's jurisdiction under Article 163(4)(a) of the Constitution. The appellant must demonstrate that the constitutional issues were both raised and determined in the courts below. See ***Nicholus Vs Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties)*** [2023] KESC 113 (KLR).

[32] A review of the record, including the pleadings, submissions, and judgments of the superior courts below, confirms that the dispute turns on the interpretation and application of constitutional provisions, namely Articles 24(4), 27, and 53. These provisions were central to the reasoning and disposition by the courts below and remain the basis of the arguments advanced by the parties before this Court. In light of the

foregoing, we are satisfied that this appeal meets the jurisdictional threshold under Article 163 (4)(a) of the Constitution and is properly before this Court.

ii. Whether the Court of Appeal improperly limited the application of Article 24(4) of the Constitution, and in doing so, misconstrued the relationship between Article 24(4) and Article 27 of the Constitution

[33] At first instance, the trial court found that SJ, the eldest child of the 1st respondent, was born before the 1st respondent and the deceased began cohabiting. As such, the court held that SJ was not entitled to benefit from the deceased's Estate. However, the trial court found that the other three children, being LK, HK and TK, although born prior to the formalization of the marriage between the deceased and the 1st respondent, were nonetheless born during their period of cohabitation and were therefore entitled to inherit.

[34] On appeal, the appellant argued that under Muslim law, children born out of wedlock are not entitled to inherit from their deceased father's estate. The appellant, in making that point, contended that the trial court erred by failing to apply this rule of succession as required under the Law of Succession Act and relevant Islamic principles. The Court of Appeal, however, upheld the trial court's decision on that issue. It held that Article 27 of the Constitution prohibits the State from discriminating against any person, directly or indirectly, on any ground. The superior court below reasoned that denying children born out of wedlock the right to inherit, while allowing those born within a marriage to benefit, would constitute unjustifiable and unfair discrimination. It emphasized that the rights of children must be assessed independently from the legal status of their parents' union and the best interest of a child should always be of paramount consideration.

[35] The Court of Appeal further invoked Article 53 (1)(d) and (e) of the Constitution, which stipulates that children have the right to be protected from abuse, neglect,

harmful cultural practices, violence, inhuman treatment, exploitative labour, and to receive parental care and protection from both parents equally, regardless of their marital status. It also held that children born of relationships not formally recognized as marriages, including those involving one partner already in a monogamous marriage, should not be denied their entitlements from the deceased's estate due to the circumstances of their birth.

[36] Additionally, the Court of Appeal drew upon Article 10 of the Constitution, which outlines national values and principles of governance and emphasized that all State organs and officers, including judges and courts, are constitutionally bound to apply and interpret the law in a manner that upholds these values and principles. Consequently, the superior court below held that any cultural or religious practice that discriminates against children based on their parents' marital status contravenes these constitutional values and principles and must be rejected. In the end, the Court of Appeal affirmed the trial court's finding that the 1st respondent and the children born from her relationship with the deceased were entitled to benefit from the deceased's Estate.

[37] It is this reasoning and conclusion by the Court of Appeal that has aggrieved the appellant. The appellant's principal contention being that, in arriving at its decision, the Court of Appeal disregarded the tenor, and constitutional significance of Article 24(4) of the Constitution. To fully appreciate the appellant's position, it is necessary to set out the relevant provision. Article 24(4) provides as follows:

> ***"The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance."***

[38] This brings us to the question; what is the proper import and effect of Article 24(4) of the Constitution? The starting point for unravelling the purport of this provision is Article 259(1) of the Constitution which commands that the Constitution is to be construed in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. It emerges from this provision that courts are obligated to "*promote*" and "*advance*" the human rights and fundamental freedoms in the Bill of Rights in a manner that safeguards the architectural integrity and normative coherence of the Constitution.

[39] Also significant is Article 20(4) of the Constitution which directs that in interpreting the Bill of Rights, a court, tribunal, or other authority must promote - the values that underlie an open and democratic society, namely, human dignity, equality, equity, and freedom; as well as the spirit, purport, and objects of the Bill of Rights. This provision affirms that the Bill of Rights is anchored in a set of values that serve both as interpretive guides and normative ideals. These values provide the matrix of ideals within which the Bill of Rights must be interpreted and applied.

[40] Article 24(4) creates a limited constitutional derogation from the equality provisions of the Bill of Rights to permit the application of Muslim personal law in specified areas—namely, personal status, marriage, divorce, and inheritance. This reflects the Constitution's respect for religious freedom, as guaranteed under Article 32, and its broader transformative commitment to pluralism. The third paragraph of the Constitution's Preamble affirms the pluralistic character of Kenyan society, declaring that the people are "***proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation***." This affirmation underscores that the Constitution continually seeks to strike a balance

between fostering national unity and preserving ethnic, cultural, and religious diversity, declaring that there shall be no State religion.

[41] This clause also aligns with the institutional recognition of Kadhis' Courts under Article 170 of the Constitution. In this respect, Article 170(5) of the Constitution, specifies the reach of the jurisdiction of Kadhis' Courts in the following terms:

> ***"The jurisdiction of a Kadhis' court shall be limited 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 and submit to the jurisdiction of the Kadhi's courts."***

We note that pertinent issues regarding Muslim law were not decided before the Kadhis' Court as provided above as the succession cause filed there was consolidated with the petition filed before the High Court. Nonetheless, the superior courts below were cognizant of the provisions of Section 2(3) of the Law of Succession Act and thereby applied Islamic law to determine the beneficiaries of the deceased who indisputably professed Muslim faith.

[42] This therefore, leads us to an analysis of the interpretation of Article 24(4) of the Constitution within the context of this matter. In doing so, a holistic interpretation of the Constitution must be adopted; reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. See our Opinion ***In the Matter of Kenya National Human Rights Commission***, Supreme Court Advisory Opinion Ref. No.1 of 2012. There is no doubt that Article 24(4) reflects a recognition of the need for reasonable accommodation in a multi-religious and diverse society such as Kenya. It forms part of the constitutional bargain struck

during the constitution-making process to preserve the autonomy of Muslim personal laws in specified domains through reasonable accommodation, a settlement reached through a long process of negotiation, compromise, public debate, and consensus. Nonetheless, the Article carefully isolates how it should be applied to persons who profess the Muslim religion and who submit themselves before the Kadhi's Court. See in this regard, **The Final Report of the Committee of Experts on Constitutional Review (**2011) at pages 55-61.

[43] It is further notable that Article 24(4) of the Constitution has a set of internal qualifiers that demarcate the scope and boundaries of the application of the provision. First, the application of the provision is limited to the "*provisions of the Bill of Rights on equality*". Second, the provision uses a very carefully expressed phrase "*qualified to the extent strictly necessary*" signaling that the derogation from the general right to equality in the Bill of Rights is not open-ended. Third, the provision limits the scope of the qualification to "*matters before the Kadhis' Courts*". Fourth, the provision is applicable only to **"***persons who profess the Muslim religion*". Fifth, the qualification is limited to "*matters relating to personal status, marriage, divorce and inheritance"*. See the persuasive decision of the Court of Appeal in ***CKC & CC (Suing through their mother and next friend JWN) Vs ANC,*** *KECA 354 (KLR).*

[44] Of significance to this appeal is the interpretation of the phrase "**qualified to the extent strictly necessary**" as specifically spelt out in Article 24(4) of the Constitution. This phrase signals that any derogation from the general right to equality under the Bill of Rights is narrowly tailored and circumscribed. In interpreting the meaning and legal effect of Article 24(4) of the Constitution, Prof. Christina Murray offers an important analytical lens in her 2013 journal article ***'Kenya's 2010 Constitution'*** published in *Neue Folge Band Jahrbuch des öffentlichen Rechts* at pp. 761–762. In that article, she suggests that:

> ***"[Article 24(4)] insistence that qualifications be 'strictly necessary' might be read to permit no greater invasion of the right to equality than is in any event permitted by [article 24 (1)] which allows reasonable limitations that are proportionate to their goals."***

In other words, Article 24(4) is not a *carte blanche* for overriding the right to equality and freedom from discrimination; rather, it remains subject to the same proportionality test embodied in Article 24(1). The effect therefore is to anchor any permissible departure within a framework of reasonableness, justification, necessity, and proportionality, thus ensuring that the principle of equality remains the default constitutional position even when Islamic legal norms are accommodated. See Victoria Miyandazi '**Equality in Kenya's 2010 Constitution: Understanding the Competing and Interrelated Conceptions**' (Hart Publishing, 2021) at page 166. Therefore, the factual circumstances of each case are a necessary consideration in employing the qualifiers stated above so as to avoid unfairness that would lead to an injustice.

[45] We have also considered a persuasive parallel of Article 24(4) of the Constitution, though not involving Muslim law which is the comparable internal qualification found in Section 15(4)(c) of the Constitution of Botswana, which provides as follows:

> *"15. Protection from discrimination on the grounds of race, etc.*
>
> *1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*
>
> *...*

4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

...

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; ..."

[46] The foregoing provision of the Botswana Constitution was subjected to interpretation in the case of ***Ramantele Vs Mmusi and Others*** *[2013] BWCA 1* by the Court of Appeal of Botswana. That case involved a challenge to the constitutionality of a customary law rule, which provided that "*only the last-born son is qualified as intestate heir to the exclusion of his female siblings*". The court was called upon to determine whether this customary rule violated the female siblings' right to equal protection of the law. The crisp question before the court was whether Section 15(4)(c) of the Constitution of Botswana exempted personal law from application of the equality clause. The Court of Appeal held that derogations such as those contained in Section 15(4)(c) of the Constitution of Botswana ought to be given a narrow and strict interpretation, and such an interpretation should not permit unchecked discrimination which is not consistent with the core values of the Constitution. The Court specifically held at paras. 71-72 thus:

> ***"...Where there is a derogation, the Court must closely scrutinise it, give it a strict and narrow interpretation and test whether such discrimination is justifiable ... It is only when the Court is satisfied that a discrimination passes that test that the Court can find that the derogation is constitutionally permissible...the derogations in Section 15(4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and***

freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest."

[47] We are in agreement with the foregoing persuasive opinion. Moreover, the notion of **"qualified to the extent strictly necessary"** is a formulation common in international human rights conventions. It closely mirrors Article 4 (1) of the International Covenant on Civil and Political Rights (ICCPR) that states:

> "*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties... may take measures derogating from their obligations under the present Covenant* ***to the extent strictly required by the exigencies of the situation****..."* [Emphasis added]

[48] The United Nations Human Rights Committee, in "**General Comment No 29 on Article 4 of the ICCPR**" (24 July 2001), in providing interpretive guidance to the notion of "***strictly required by the exigencies of the situation***" in Article 4(1) of the ICCPR, observed in paragraph 2 that:

> *"...the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers..."*

[49] Also comparable is, Article 15(1) of the European Convention on Human Rights which uses the same language. It states:

> *"In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention* ***to the extent strictly required by the exigencies of the situation****..."* [Emphasis added]

[50] The European Court of Human Rights has in a number of cases held that assessing the notion of a derogation being to the "extent strictly required" under Article 15(1) speaks to the notion of proportionality. See in this regard ***Brannigan and McBride Vs. the United Kingdom*****,** *Application no. 14553/89 at paras. 48-66; See also* ***A. and Others Vs the United Kingdom***, Application no. 3455/05 at *paras 182-190*.

[51] Therefore, persuaded by the foregoing comparative analysis, and returning to Article 24(4) of the Constitution, we can only come to the inevitable conclusion that the term "***extent strictly necessary***" introduces the principle of proportionality as the threshold for assessing whether any derogation is necessary or justified. In essence, any departure from the right to equality must be narrowly tailored and justified by compelling circumstances. Derogations under Article 24(4) must also be confined within the bounds of absolute necessity and within the confines of the parties who profess the Muslim religion. Put differently, Article 24(4) must be read as allowing only narrowly tailored and strictly necessary departures from the equality and freedom from discrimination provisions of the Bill of Rights. It does not authorize broad indiscriminate or automatic exclusions of Muslims from constitutional equality protections, but rather permits limited exceptions and under stringent conditions in any event.

[52] Based on the foregoing, does the exclusion of children born out of wedlock from inheriting their deceased father's estate under Islamic Law (although born by the same deceased) satisfy the test of proportionality so as to provide justification for denying them the protection of the equality provisions in the Bill of Rights in the manner envisaged in Article 24(4)? In ***Kandie Vs Alassane BA & another*** [2017] KESC 13 (KLR) (28 July 2017), this Court, at paras 73–77, affirmed that proportionality analysis in the context of adjudicating rights under the Bill of Rights involves a balancing exercise guided by the "reasonable and justifiable" test. The Court explained that for the

effect of impugned law on a right to be proportionate, it must pursue a legitimate objective and satisfy three subtests: First, the measure adopted must be suitable—meaning it must be capable of achieving the intended goal (suitability). Second, it must be necessary—there must be no less restrictive means available to achieve the same purpose (necessity). Third, the benefits of achieving the objective must outweigh the harm caused to the individual whose right is affected (proportionality in the strict sense).

[53] Applying the foregoing "reasonable and justifiable" test to the circumstances before us, we find ourselves in agreement with the Court of Appeal that no reasonable justification has been advanced, nor can we discern any, that would warrant drawing a distinction between children in relation to their entitlement to their father's Estate in departure from the guarantee to equal protection and benefit of the law in Article 27(1) of the Constitution. In our view, denying children born out of wedlock by the same parents the same benefits accorded to children born within wedlock, on the basis of the alleged "sins" of their parents, is unreasonable and unjustifiable. This therefore means that any attempt to exclude children born out of wedlock from benefitting from their father's estate fails the proportionality test envisaged by the phrase **"qualified to the extent strictly necessary"** which is a condition under Article 24(4) of the Constitution.

[54] The foregoing conclusion is reinforced by other provisions of the Constitution. Towards that end, it is important to recognize that Article 24(4) must be read in harmony with other provisions, such as Articles 21 (3) and 53 of the Constitution. That is why this Court has consistently held that the Constitution must be read as a whole and not in isolation "between the lines," so to speak. See ***In the Matter of Kenya National Commission on Human Rights*** [2014] KESC 33 (KLR) at para. 26.

[55] The Constitution expresses its commitment to the protection of the rights of the vulnerable groups including children. Article 21 (3) of the Constitution expresses this idea thus:

> *"All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities."*

[56] In addition, Article 53 of the Constitution provides that –

> *"53*
>
> *1) Every child has the right—*
>
> *(a) to a name and nationality from birth;*
>
> *(b) to free and compulsory basic education;*
>
> *(c) to basic nutrition, shelter and health care;*
>
> *(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;*
>
> *(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and*
>
> *(f) not to be detained, except as a measure of last resort, and when detained, to be held—*
>
> *(i) for the shortest appropriate period of time; and*
>
> *(ii) separate from adults and in conditions that take account of the child's sex and age.*

2) ***A child's best interests are of paramount importance in every matter concerning the child****."* [Emphasis added]

In **CMM (Suing as the Next Friend of and on Behalf of CWM) & 6 others Vs Standard Group & 4 others** *[2023] KESC 68 (KLR),* this Court held at para. 47 that Article 53(2) constitutes an enforceable right of the child, not merely a guiding principle. As a self-standing right, it also reinforces the broader framework of human rights under Chapter Four of the Constitution and applies to all aspects of the law, whether civil or criminal, that affect a child, in accordance with the principle of the best interests of a child.

[57] The principle of paramountcy of the child's best interest has been considered in other cases involving children and religion. The English Court of Appeal in ***Re R (A Minor) (Religious Sect)*** [1993] 2 FCR 525 where the court observed:

> ***"It is not part of the court's function to comment upon the tenets, doctrines or rules of any particular section of society provided that these are legally and socially acceptable.... The impact of the tenets, doctrines and rules of society upon a child's future welfare must be one of the relevant circumstances to be taken into account by the court... bearing in mind that the paramount objective of the exercise is promoting the child's welfare, not only in the immediate, but also in the medium and long-term future during his or her minority..."***

[58] Similarly, in ***Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Another Vs Mali*** (Application No. 046/2016) [2018] AfCHPR 9 (11 May 2018), the African Court on Human and Peoples' Rights

found that the adoption and continued application of Islamic inheritance law, codified in Article 751 of Mali's new Family Code, violated the right to inheritance. Under this Code, children born out of wedlock were denied any legal right to inherit. The Court held that the impugned provisions were discriminatory and violated several human rights instruments, including Article 4 of the African Charter on the Rights and Welfare of the Child, which upholds the principle of the best interests of the child.

[59] What emerges from the foregoing is that in cases involving the welfare of children touching on religious laws, doctrines, teachings, rules, or tenets, the paramount consideration by the court must be the protection of the welfare and best interests of the child, taking into account the specific circumstances of each case. Accordingly, we find no reason to depart from the Court of Appeal's conclusion that, since every child is entitled to parental care and protection under Article 53 (1)(e) of the Constitution, it would be contrary to the best interests of the child for the courts to deny a child such care and protection on the basis of the marital status or perceived "sins" of the child's parents.

[60] In conclusion, we dismiss this limb of the appellant's appeal and affirm the judgment of the Court of Appeal.

iii. Whether the Court of Appeal failed to give effect to the mandatory application of Muslim law as provided under Section 2(3) of the Law of Succession Act.

[61] The appellant contends that the Court of Appeal failed to apply the Islamic law of inheritance in determining the succession dispute before it. She asserts that it was mandatory for the superior court below to apply Islamic law in this case owing to the undisputed fact that the deceased died a Muslim. Therefore, in doing so, she urges, the court violated Section 2(3) of the Law of Succession Act which is categorical that the

Estate of any person who at the time of his death was a Muslim shall be governed by Islamic law. The said provision stipulates thus:

> *"... the provision of this Act shall not apply to testamentary or intestate succession to the estate of any person who at the time of this death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law."*

[62] It is worth noting that the Court of Appeal acknowledged that the deceased was a Muslim and that Islamic law was applicable in the distribution of his estate. However, the court also found that children born out of wedlock could not be excluded from inheriting solely on the basis of their birth status, as such exclusion would contravene Articles 27 and 53 of the Constitution. A more poignant point was the fact that the children in question were born by the same deceased, albeit out of wedlock, and that during his lifetime he provided for them. As a result, the appellate court declined to give effect to the impugned rule of Islamic law to the extent that it infringed upon these constitutional rights.

[63] Importantly, the Court of Appeal interpreted the relevant rule of Islamic law in a manner that harmonized it with the values and rights enshrined in the Bill of Rights. This approach is consistent with the requirements of Article 20 (3)(a) and (b) of the Constitution, which provides that in applying a provision of the Bill of Rights, a court shall: (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and (b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom. The implication of this provision is that all laws, including religious or customary law, must be interpreted and applied through the lens of the Bill of Rights. Where the law applicable to a dispute does not yield an outcome consistent with those values and rights, the courts must integrate the normative content of the Bill of Rights into the interpretation and application of that

law. In doing so, the law is transformed and applied in a manner that promotes the Constitution's transformative vision.

[64] We therefore dismiss this limb of the appellant's appeal and affirm the decision of the Court of Appeal on the issue.

iv. What order(s) should issue?

[65] The totality of the foregoing is that we agree with the findings of the Court of Appeal and as such, uphold its judgment delivered on 10th November 2023. Taking into account the nature of this matter, we hereby direct that the distribution of the deceased's Estate to the identified beneficiaries by the High Court should be on a priority basis. Since the beneficiaries of the deceased Estate are the two widows, namely the appellant and the 1st respondent, we find it expedient to direct that letters of administration for the Estate of the deceased be issued jointly to the appellant and the 1st respondent being the widows of the deceased. We also reiterate the order by the Court of Appeal that the matter be remitted to the High Court at Mombasa for determination of respective entitlements of the beneficiaries by a Judge other *than Onyiego, J*. and that this be on a priority basis.

E. COSTS

[66] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Rai & 3 Others Vs Rai & 4 Others*** [2014] KESC 31 (KLR), we find that due to the public interest nature of this matter, each party should bear its own costs.

F. ORDERS

[67] In the premise, we issue the following orders:

i. ***The appeal dated 14th December, 2023 and filed on 18th December, 2023 is hereby dismissed.***

ii. ***The Judgment of the Court of Appeal delivered on 10th November, 2023 is hereby affirmed and specifically the finding that the children of the appellant as well as the 1st and 3rd respondents are beneficiaries and/or dependants of the Estate of the deceased. For clarity, this refers to all of the appellant's four children; three of the 1st respondent's children, that is, LK, HK and TK; and the 3rd respondent's son, HM.***

iii. ***The letters of administration for the Estate of the deceased be issued jointly to the appellant and the 1st respondent.***

iv. ***This matter be remitted to the High Court Mombasa for determination of respective entitlements of the beneficiaries by a Judge other than Onyiego, J. on a priority basis.***

v. ***This being a family matter, we order that Parties do bear their respective costs.***

vi. ***We hereby direct that the sum of Kshs 6,000 deposited as security for costs upon lodging of this Appeal be refunded to the Appellant.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** day of **June**, 2025.

.....

M. K. KOOME

CHIEF JUSTICE & PRESIDENT

OF THE SUPREME COURT

.....	.....
P.M. MWILU	**M.K. IBRAHIM**
DEPUTY CHIEF JUSTICE &	**JUSTICE OF THE SUPREME COURT**
VICE PRESIDENT OF	
THE SUPREME COURT	
.....	.....
S. C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA