

# **Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation**

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**Kariuki Muigua, Ph.D.**

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### **Abstract**

*This paper offers a reflective discussion on the psychological aspects of conflict and how Alternative Dispute Resolution (ADR) practitioners involved in mediation can effectively identify and address the psychological aspects of conflicts as a way ensuring that the process achieves lasting outcomes for the parties. This is because in almost all conflicts, there are usually underlying needs of the parties to have the root causes of the conflict fully addressed to avoid recurrence of the problem. Arguably, the ability of any mediator to identify and address these aspects will not only boost their reputation as competent mediators but will also go a long way in helping parties negotiate meaningfully and achieve outcomes that are win-win and long lasting. The author thus offers some thoughts on how mediators can achieve this.*

### **1. Introduction**

It has rightly been pointed out that the integration of modern dispute resolution processes into legally pluralistic African justice systems has been accomplished through multiple mechanisms, including in some cases, merging traditional conflict processes with modern Alternative Dispute Resolution (ADR).<sup>1</sup> In others, there have been varied adaptations of western ADR models.<sup>2</sup> The latter arguably captures Kenya's approach to incorporation of ADR mechanisms into the mainstream justice system. The current Constitution of Kenya 2010 under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional conflict resolution mechanisms should be promoted as long as they do

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<sup>1</sup> Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' *Harvard Negotiation Law Review*, Vol. 21, 59, Fall 2015, pp. 59-106, p. 68.

<sup>2</sup> *Ibid*, p.68.

## *Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation*

not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.<sup>3</sup>

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.<sup>4</sup> This procedure exists as a remote form of court-annexed mediation<sup>5</sup>. On the other hand, parties in a conflict that is not before a court may undergo a mediation process and conclude the mediation agreement as a contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.<sup>6</sup>

On a more practical level, mediation is also applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those matters. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely applied by many communities in Kenya. It is a safe method as it preserves the relationship of the parties as it was before the conflict.<sup>7</sup>

In recognition of the important role of mediation in conflict management, there have been efforts by the Judiciary to accredit mediators to facilitate the Judiciary's Court Annexed Mediation program. While it is appreciated that there are different training bodies in the country and different approaches to mediation, this paper explores the *psychological facets of a conflict* that emerge in mediation to help mediators become more effective in discharging their duties as mediators (emphasis added). This is because, while the mediators are assigned matters by the Judiciary based on their qualifications, there are no guidelines on how they should approach the same. The focus is on the outcomes. They are expected to rely on their professional training

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<sup>3</sup> Constitution of Kenya 2010.

<sup>4</sup> Civil Procedure Rules, former Order XXIV Rule 6 (now order 25 rule 5(1) and section 3A of the Act.

<sup>5</sup> The Pilot Project on Court Annexed Mediation in Kenya commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Pilot Project was entrusted to the following bodies: Mediation Accreditation Committee (MAC); Alternative Dispute Operationalization Committee (AOC); and the Secretariat (Technical Working Group (TWG)). The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya. The *Mediation (Pilot Project) Rules, 2015* were enacted to guide the process. The project has since been rolled out to the rest of the country beginning May 2018.

<sup>6</sup> Law of Contract Act, Cap 14, Laws of Kenya Revised Edition 2012 [2002]. *Government Printer*, Nairobi.

<sup>7</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 25.

which is as diverse as their backgrounds in training. As such, most of the professional skills, tactics and approaches to mediation are expected to be picked along the way as they gain experience and interact with different matters.

This paper therefore helps them understand some of the psychological aspects that they should pay attention to as they discharge their duties as mediators, based on the parties involved, model of mediation adopted and the type of disputes at hand. The paper first looks at the advantages and disadvantages of engaging in mediation, highlights the different models of mediation and finally explores the role of mediators which includes identifying the different psychological aspects of the conflict that are likely to arise, with the aim of helping mediators, both nascent and experienced, appreciate these aspects whenever they are called upon to resolve conflicts through mediation.

According to the American Psychological Association, psychology is the study of the mind and behavior; it is the study of the mind, how it works, and how it affects behaviour.<sup>8</sup>

## **2. The Advantages and Disadvantages of Mediation**

Mediation process is associated with the advantages of being, *inter alia*, a fast process compared to the other processes. The timing of the process is within the control of the parties, is informal, cost-effective, flexible, efficient, confidential, preserves relationships, provides a range of possible solutions and there is autonomy over the process and the outcome. On confidentiality it is generally agreed that any admissions, proposals or offers for solutions do not have any consequences beyond the mediation process and cannot, as a general rule, be used in subsequent litigation or arbitration.<sup>9</sup>

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<sup>8</sup> Nordqvist, C., “What is psychology and what does it involve?” *Medical News Today* Last updated Thu 1 February 2018 (Reviewed by Timothy J. Legg, PhD, CRNP).

Available at <https://www.medicalnewstoday.com/articles/154874.php> [Accessed on 1/08/2018].

<sup>9</sup> World Intellectual Property Organization, “Mediation: Frequently Asked Questions,” available at <http://www.wipo.int/amc/en/mediation/guide/> [Accessed on 1/08/2018]. This is also captured in the *Mediation (Pilot Project) Rules, 2015* which provide under Rule 12 that ‘all communication during mediation including the mediator’s notes shall be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings’.

## *Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation*

Regarding its expeditious and time saving nature, the American Bar Association<sup>10</sup> notes that it is often possible to schedule mediation around work schedules or on the weekend. Mediation is thus often marketed as being both economically and time efficient. However, that marketing assumes that both parties are honestly willing to mediate the dispute. If one party (or both parties) do not enter the mediation with the intention to make concessions and reach a compromise then the mediation is likely to fail. While mediations are less expensive and take less time than court cases, they still cost money and can last anywhere from a few hours to a few days. The cost of the mediation, and obviously the time it took, are not refundable and the parties to a failed mediation typically need to incur the costs of litigation after the failed mediation is over.<sup>11</sup>

Mediation is also non-coercive in that parties have autonomy over the forum, the process, and the outcome. There are no sanctions such as are applied in courts and in arbitration.

In summary, mediation is associated with the following positive aspects: It helps to identify the true issues of the dispute; It resolves some or all of the issues; Agreement can be reached on all or part of the issues of the dispute; The needs and interests of the parties are met (in part or in full); The parties reach an understanding of the true cause of the dispute; The parties reach an understanding of each other's needs and interests; It provides the possibility of preserving the relationship; and an improved relationship may result.<sup>12</sup>

Despite possessing the above positive attributes mediation has some drawbacks.<sup>13</sup> Firstly, there is the issue of 'power imbalance'. Power is a major concern in mediation. Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome such that the agreement reflects largely only that party's needs and interests. Power also has broader repercussions in mediation as it may affect the legitimacy of the process itself. For a mediation process to be legitimate, it must be able to deal fairly with disputes

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<sup>10</sup> American Bar Association, "Beyond the Myths; Get the Facts about Dispute Resolution", Washington DC, 2007, p. 8. *Published by the American Bar Association Section of Dispute Resolution with the generous support of the JAMS Foundation.* Sourced from [www.abanet.org/dispute](http://www.abanet.org/dispute), [Accessed on 1/08/2018].

<sup>11</sup> LawInfo, "The Pros and Cons of Mediation," available at <https://resources.lawinfo.com/alternative-dispute-resolution/mediation/> [Accessed on 1/08/2018].

<sup>12</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 25.

<sup>13</sup> See generally Owen M. F., "Against Settlement," *Yale Law Journal*, Vol.93, no. 1073 (1984).

involving significant power differences.<sup>14</sup> A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.<sup>15</sup> Rarely, if ever, will power be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would accurately measure the distribution of power between parties, and then intervene to redistribute power more equally.<sup>16</sup>

Secondly, mediation suffers from its non-binding nature. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.<sup>17</sup> It is a process that requires the goodwill of the parties. The non-binding nature of mediation also means that a decision cannot be imposed on the parties.<sup>18</sup>

Thirdly, mediation may lead to endless proceedings. Moreover, and unlike in litigation, there are no precedents that are set in mediation hence creating uncertainty in the way decisions will be made in future. Lastly, mediation may not be suitable when one party needs urgent protection like an injunction and hence viewed against litigation this could be a demerit.<sup>19</sup>

### **3. Models of Mediation: An Overview**

Mediators are generally free to use a variety of strategies and techniques during mediation, which often vary from one mediator to the other depending on their personality, experience, and beliefs in the role of mediation.<sup>20</sup>

It has rightly been pointed out that there is considerable diversity in the practice of mediation internationally and within countries. Furthermore, mediation is used for various

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<sup>14</sup>Baylis, C. & Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol.7, No.8 [2005], Art.1, p.135.

<sup>15</sup>Manning, C., "Power Imbalance in Mediation," p. 2. Available at <http://dialmformediation.com.au/> [Accessed on 1/08/2018].

<sup>16</sup>Power Imbalances in Mediation, SCMC Briefing Papers, *Scottish Community Mediation Centres*, Edinburgh. Available at [www.scmc.sacro.org.uk](http://www.scmc.sacro.org.uk), [Accessed on 1/08/2018].

<sup>17</sup>World Intellectual Property Organization, "Mediation: Frequently Asked Questions," available at <http://www.wipo.int/amc/en/mediation/guide/> [Accessed on 1/08/2018].

<sup>18</sup> Ibid.

<sup>19</sup> Findlaw, "Alternative Dispute Resolution: Which Method Is Best For Your Client," available at <https://corporate.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-your.html> [Accessed on 1/08/2018].

<sup>20</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 26.

## *Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation*

purposes and operates in a variety of social and legal contexts. As such, the mediator usually possesses different types of training, cultural backgrounds<sup>21</sup>, skills levels and operational styles. These factors all contribute to the challenge of trying to define and describe mediation practices.<sup>22</sup>

There are various models of mediation that are used in different jurisdictions and subject areas: *Facilitative mediation*- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; *Settlement mediation*- where parties are encouraged to compromise in order to settle the disputes between them; *Transformative mediation*- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; and *Evaluative mediation*- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court remedies. Some mediators utilise a number of models in the same mediation.<sup>23</sup>

Despite the foregoing, it should be noted that scholars have summarised about five elements of a successful mediation process that would work in various approaches: First, there needs to be ‘an impartial third party facilitator’ who helps the parties explore the alternatives and find a satisfactory resolution; Second, the mediator must ‘protect the integrity of the proceedings’ by setting ground rules that all parties must follow and protecting the confidentiality of the proceedings; Third, there must be ‘good faith from the participants’ or the process will soon be frustrated and fail; Fourth, those with full authority to make decisions must attend the proceedings to show true commitment to the process. If one side lacks full authority, the other side can easily become frustrated when approval from superiors must continually be obtained;

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<sup>21</sup> Some scholars have argued that ‘the pre-conceived expectations of the mediation process, which are a synthesis of culture and power relationships, create the greatest challenges a mediator faces when working with parties from other cultures.’ De Voe, P.A. & Larkin, C.J., ‘Cultural Challenges to Mediation,’ *ACResolution*, A Quarterly Magazine, Fall-Winter 2007, pp. 30-31, at p. 30. Available at [https://law.wustl.edu/faculty\\_profiles/documents/larkin/CulturalChallengesMediation.pdf](https://law.wustl.edu/faculty_profiles/documents/larkin/CulturalChallengesMediation.pdf) [Accessed on 1/08/2018].

<sup>22</sup> Drews, M., ‘The Four Models of Mediation,’ *DIAC Journal- Arbitration in the Middle East*, Vol.3, No. 1(1), 2008, p.44.

<sup>23</sup> *Ibid*; See also Fenn, P. *Introduction to Civil and Commercial Mediation*, Part 1 (Chartered Institute of Arbitrators), p. 42:

Para. 4.12 provides for *contingency approach* to mediation, which means that there is no set procedure but the procedure is tailored to suit the parties and the dispute in question. This often means that mediation is conducted without joint meetings and the mediators play a variety of roles.

and finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.<sup>24</sup>

It is also true that ‘practitioners are likely to be influenced by their professional background, their training, skill level and their framework for practice. They may have different perspectives that influence their style and may not always be consistent in every case. This influence most often comes from their initial training, their mentors, literature, ongoing professional and personal development, membership of professional bodies and their organisational or agency standards and accreditation requirements.’<sup>25</sup>

#### **4. Making Mediation Work: The Role of Mediators in the Mediation Process**

The mediator’s role is considered to be multiple, that is: to help the parties think in new and innovative ways, to avoid the pitfalls of adopting rigid positions instead of looking after their interests, to smooth discussions when there is animosity between the parties that renders the discussions futile, and in general to steer the process away from negative outcomes and possible breakdown towards joint gains.<sup>26</sup> In addition, it has been observed that the mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all concerned.<sup>27</sup>

In summary, this role is believed to incorporate the following: Help to coordinate the meetings; introduce the parties; explain the process to the parties; set the agenda and rules; create a cease-fire between the parties; open communication channels; gain the confidence and trust of the parties; gather information and identify obstacles; allow the parties to express feelings and vent emotions; help the parties to identify and understand their interests and priorities; help the parties with brainstorming creative options and solutions; help in defining acceptable objective criteria; help the parties understand the limitations of their demands through what is known as “a

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<sup>24</sup> Marsh, Stephen R. 1997a. What is mediation? Available at <http://members.aol.com/ethesis/mw1/adr1/essayi.htm>, (As quoted in Smith, C.R., ‘Mediation: The Process and the Issues,’ (Industrial Relations Centre, Queen’s University Kingston, Ontario, 1998), p.3.

<sup>25</sup> Brandon, M. & Stodulka, T., ‘A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,’ *Queensland University of Technology Law and Justice Journal*, Vol. 8 No 1, 2008, pp. 194-212, at p. 209.

<sup>26</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 24.

<sup>27</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, op cit., p. 24.



reality test”; help in evaluating alternatives; allow the process to move forward according to the needs and pace of the parties; help in crafting the agreement; and help in validating the agreement by the courts (if there is a court that has jurisdiction).<sup>28</sup>

#### **4.1 Psychological Aspects**

It has been argued that realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. The same should also be achieved through a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis added).<sup>29</sup> Arguably, part of achieving party satisfaction involves addressing the psychological facets that may arise in the mediation process.

Mediation can be viewed from a psychological lens rather than merely as an alternative to litigation and arbitration. At mediation, the psychology of the parties is at play. The mediators’ psychology is also relevant. Scholars have argued that all disputes are affected and influenced by psychological or emotional principles or what is referred to as psychological barriers.<sup>30</sup> All disputes/conflicts involve injury to feelings. This is so because conflicts do occur within individuals, as well as between individuals, groups, departments, organizations and nations.

In discussing negotiation, some authors have argued that it involves individual-level psychological processes: cognition, emotion, and motivation; it involves multiple social processes: persuasion, communication, cooperation, competition and powers; and it is always socially situated and thus can involve a wide range of social contextual factors.<sup>31</sup> The mediator must, therefore, be aware of the psychological dimensions of the conflict in order to be able to effectively assist the parties to conclude negotiating and reach mutually acceptable solutions.

Every conflict, by definition, contains an indispensable emotional element. The discipline that is most familiar with these emotional dynamics is psychology. Therefore, mediation can

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<sup>28</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, op cit., pp. 25-26.

<sup>29</sup> See Maiese, M., "*Principles of Justice and Fairness*," in Burgess, G. and Heidi Burgess, H. (Eds.) —*Conflict Information Consortium, Beyond Intractability*, University of Colorado, Boulder (July 2003).

<sup>30</sup> Strasser, F. & Randolph, P., "*Mediation: A Psychological Insight into Conflict Resolution*", (Continuum International Publishing Group London, New York, 2004), at pp. 2-30.

<sup>31</sup> Gelfand, M.J., Fulmer, C.A. and Severance, L., "The psychology of negotiation and mediation," *Handbook of industrial and organizational psychology*, Vol.3 (2010), pp. 495-554 at p.498; See also the idea about self-help mediation, that most conflicts are manageable or preventable automatically by every individual through the use of social skills learned throughout life at <http://www.mediationworks.com/>, [Accessed on 1/08/2018].

learn from psychology how to be more effective in resolving conflicts.<sup>32</sup> Each person's attitudes, intentions, intuitions, awareness, context and capacity for empathetic and honest emotional communication have a significant impact on their experience of conflict and capacity for resolution.<sup>33</sup>

Some fundamental tenets on conflict have been suggested as follows: that conflict is ever present and cannot be eliminated but can be worked with; that the attitude and stance of the mediator can be of significance to the outcome; and above all that the use of psychotherapeutic tools can facilitate a paradigm shift in the parties approach to conflict. They demonstrate how the mediator can move parties in a dispute from a position of intransigent adversity to a working alliance, thereby achieving a "good enough" resolution.<sup>34</sup>

The mediator has to consider the emotional needs of a party at a mediation table. At the very basic level there is a need to be heard. There is a need for accurate empathy, validation and a respectful, appropriately paced process of dealing with the conflict. The parties may have suffered loss, which is financial, reputational or market share related. It may be the loss of certain hopes and dreams, aspects of relationships and meaningful parts of their identity. These losses are in the realm of psychology and should be dealt with delicately.<sup>35</sup>

The clinical skills and experience used in assessment, diagnosis and treatment by psychologists are relevant in the mediation context.<sup>36</sup> Seminal writers on mediation and psychology have over time come up with certain approaches that can be employed in a mediation situation to address the psychological dimensions at play. Some of these approaches are discussed hereunder.

#### **a. Understanding the Parties**

The mediator should carry the agenda of assisting the parties to continue with the negotiations with a view to resolving the conflict. It has rightly been argued that the unanimously

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<sup>32</sup> Cloke, K., "Building Bridges between Psychology and Conflict Resolution—Implications for Mediator Learning." Retrieved online from <http://www.mediate.com/articles/cloke7.cfm> (2008), p.77. [Accessed on 1/08/2018].

<sup>33</sup> Ibid.

<sup>34</sup> Strasser, F. & Randolph, P., "*Mediation: A Psychological Insight into Conflict Resolution*", op. cit.

<sup>35</sup> See generally, Diamond, I., "The Value of a Psychologist Mediator", March 2011. Available at <https://www.mediate.com/articles/diamondi1.cfm> [Accessed on 1/08/2018].

<sup>36</sup> Diamond, I., "The Value of a Psychologist Mediator". Available at <https://www.mediate.com/articles/diamondi1.cfm> [Accessed on 1/08/2018].

## *Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation*

accepted roles of the mediator are those of a facilitator/catalyst of the communication and of a facilitator of the negotiation.<sup>37</sup> Their powers are summarised as persuasion and communication skills.<sup>38</sup> They are also seen as negotiators who clarify issues, identify alternatives, and help disputants come to a mutual agreement, without making a decision for them.<sup>39</sup> Thus, mediation is based on communication principles, negotiation, providing information and problem solving.<sup>40</sup>

It has also been pointed that it is possible for mediators to become targets of one or both parties' anger and frustration, which should not be taken personally.<sup>41</sup> It is even suggested that it is good to let the parties relieve their frustrations, and experienced mediators will be able to facilitate the release of these emotions without themselves getting emotionally involved and compromising their role.<sup>42</sup>

The mediator should understand that the parties are governed by their own outlook and their own 'self-concept' and 'self-esteem'.<sup>43</sup> Emotional or psychological obstacles are created because we are people first and litigants second. People get angry, depressed, fearful, hostile, frustrated and offended. They have egos that can easily be threatened.

It has been argued that the mediator will first need to explore how these people exist as persons prior to being litigants. By examining how these persons 'function' the mediator can reveal and determine the strategies they have adopted to extricate themselves from the conflict situation.<sup>44</sup> Understanding what the problem is, the thinking, feelings and emotions of the parties by asking them open-ended questions is essential if resolution is to be achieved in mediation.

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<sup>37</sup> Stoica, S., 'The Role And The Techniques Used By The Mediator In The Mediation Process,' *Challenges of the Knowledge Society*, Vol. 2011, No.1, 1986-1995, p. 4.

<sup>38</sup> See generally Bahr, S.J., "An evaluation of court mediation: A comparison in divorce cases with children," *Journal of Family Issues*, Vol.2, no. 1 (1981): 39-60, p. 41.

<sup>39</sup> *Ibid*, p. 41.

<sup>40</sup> Committee of Accrediting Organizations in Family Mediation (COAMF) (ed.), *Standards of Practice in Familial Mediation*, (Committee of Accrediting Organizations in Family Mediation (COAMF), Montreal, 2016), p.6. Available at <https://www.barreau.qc.ca/pdf/mediation/familiale/guide-pratique-meditation-familiale-an.pdf> [Accessed on 1/08/2018].

<sup>41</sup> Smith, C.R., 'Mediation: The Process and the Issues,' p.6.

<sup>42</sup> Smith, C.R., 'Mediation: The Process and the Issues,' *op cit.*, p.6; See also generally, Duffy, J., "Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein," *Queensland U. Tech. L. & Just. J.* Vol.10, No.1, 2010, p.44.

<sup>43</sup> Diamond, I., "The Value of a Psychologist Mediator", *op cit.*

<sup>44</sup> *Ibid*.

This is because understanding the opponent's position does not mean that you agree with it but may help a party revise its own position.<sup>45</sup>

### **b. Proposals by the Mediator**

There is a prevalent view among scholars that a proposal from a mediator often allows both parties to save face, and enter an agreement that neither is willing to propose. This may happen where there is trust and rapport between the mediator and the parties, and if the mediator's proposal is in striking range of both parties.<sup>46</sup>

It has also been contended that issues of self-identity and self-esteem play an important role in mediation. Sometimes they are spoken of in terms of a party's need to "save face" or of a person's 'ego' clouding his thinking. Most people take the conflict personally and the outcome of the mediation is a reflection of who they are.<sup>47</sup>

The "IDR Cycle," that is, the cycle of narcissistic inflation, deflation and realistic resolution also typically occurs in mediation. The mediator's ability to deal with issues of self and identity is thus a key ingredient of a successful mediation. These issues arise not only for the parties but also for the mediator as well.<sup>48</sup> The mediator uses interventions such as 'looping' and reframing.<sup>49</sup> The term 'looping' has been used to describe the process of the mediators reciting back or neutrally paraphrasing the statements of the parties in order to demonstrate understanding.<sup>50</sup>

### **c. Meeting the Parties' Needs**

Other tools available to the mediator include empathy which helps parties to reconnect with a deeper sense of reflective functioning and capacity for insight.<sup>51</sup> The mediator should bear in mind that issues of self-identity are implicated in all aspects of human conflict. The mediator

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<sup>45</sup> Jacobs-May, J., "The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*", available at [www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf](http://www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf), [Accessed on 1/8/2018].

<sup>46</sup> Ibid; Strasser, F. & Randolph, P., "*Mediation: A Psychological Insight into Conflict Resolution*", op. cit, pp.43-44.

<sup>47</sup> Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR Cycle", *Pepperdine Dispute Resolution Law Journal*, Vol. 10, No.2, 2010, p. 180. Parties in mediation typically pass through a cycle of *psychological inflation* (overconfidence), *deflation*, and, finally, if the dispute settles, *realistic resolution*. This is often referred to as the IDR cycle.

<sup>48</sup> Ibid., pp. 189-200.

<sup>49</sup> Friedman, G.J. & Himmelstein, J., "Resolving Conflict Together: The Understanding Based Model of Mediation, 2006, *Journal of Dispute Resolution*, pp. 523-529.

<sup>50</sup> Ibid.

<sup>51</sup> Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR Cycle", op. cit, p. 207.

must come up with ways of satisfying basic human needs such as security, status, autonomy, love, fairness and economic well-being.<sup>52</sup>

From the space created by the release of expectation and identity the resolution has had room to emerge. Sometimes a party just wants to be apologized to. Hearing “I am sorry” may soften the ego of a party who had taken a hard-line stand in a mediation. Not all mediations require one party to forgive the other; yet in some mediations, an apology from one side and forgiveness on the other can play an important role in resolving the conflict.<sup>53</sup>

#### **d. Creative Solutions**

It has already been noted elsewhere in this paper that mediation as a process allows for creative solutions. Creative solutions are arrived at if the parties actually participate in the generation of outcomes that are mutually acceptable. Where parties have voluntarily participated in the generation of options to their conflict, the likelihood of coming to a creative solution are very high. The contention here is that parties generally see things from different angles when they are actively involved in the creation of solutions to their problems and may end up making allowances they otherwise might not make. Participation by the parties in *generating options* and deciding on how to meet needs makes them own the process and the outcome (emphasis added). Involving parties in creating solutions to their problems is, thus, essential in ensuring that the outcome of a mediation process is acceptable to the parties.<sup>54</sup>

As already stated, in every conflict there are certain emotions, feelings and other psychological matters at play. If these psychological aspects can be harnessed by mediators in the course of conflict management, then mediation can become a more effective mechanism in resolving conflicts.<sup>55</sup> Each person’s attitudes, intentions, intuitions, awareness context and

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<sup>52</sup> See generally, Fisher, R. & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981).

<sup>53</sup> See generally, *The Psychology of Mediation*, Pretice Mediation LLC, available at <http://www.mediator.seattle.com>, [Accessed on 1/8/2018].; Jacobs-May, J., “The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*”, op.cit.

<sup>54</sup> Jacobs-May, J., “The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*”, op.cit.

<sup>55</sup> Cloke, K., “Building Bridges between Psychology and Conflict Resolution-Implications for Mediator Learning, American Institute of Mediation, available at [www.americaninstituteofmediation.com](http://www.americaninstituteofmediation.com), p.77. [Accessed on 1/8/2018].

capacity for empathetic and honest emotional communication have a significant impact on their experience of conflict and capacity for resolution.<sup>56</sup>

Further and as earlier indicated, there are certain fundamental tenets: that conflict is ever present and cannot be eliminated but can be worked with; that the attitude and stance of the mediator can be of significance to the outcome; and above all that the use of psychotherapeutic tools can facilitate a paradigm shift in the parties approach to conflict. The mediator can move parties in a dispute from a position of intransigent adversity to a working alliance, thereby achieving an outcome that is acceptable to the parties.<sup>57</sup>

Consequently, the need by a mediator to consider the emotional needs of the parties at a mediation table is of utmost importance if a resolution is to be achieved. For example, at the very basic level parties need to be heard, they need accurate empathy, validation and a respectful, appropriately paced process of dealing with the conflict. Whether the parties have suffered loss, which is financial, reputational, market share related, or they have lost certain hopes and dreams or aspects of relationships and meaningful parts of their identity, such losses are in the realm of psychology and should be dealt with delicately. For that reason, in a dispute involving such losses the mediator cannot ignore the clinical skills and experience used in assessment, diagnosis and treatment by psychologists in unraveling the emotions and feelings of the parties to realize a resolution in the conflict.<sup>58</sup>

#### **e. Fairness in Mediation**

Fairness is one of the abstract concepts influencing mediation. Some scholars have argued that it is inherent for every human being to react to unfairness. The hardwired reaction to perceived *unfairness* can be a particular source of trouble in mediation (emphasis added).<sup>59</sup> In addition, when a disputant is cooperative, generous and trustworthy, the reward centers of the

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<sup>56</sup> Ibid. See also Diamond, I., “The Value of a Psychologist Mediator”, available at [www.mediate.com](http://www.mediate.com) [Accessed on 1/8/2018].; who argues that a mediator who understands the psychological imperatives will engage with the parties during caucuses to ensure they open up about their lives or even vent out. Through such caucuses the mediator gets wider possibilities of understanding the conflict context; and where there is trust and good rapport between the mediator and the parties, the parties will be satisfied with both the process and the outcome of the process because of the creative options generated by parties.

<sup>57</sup> Strasser, F. & Randolph, P., “*Mediation: A Psychological Insight into Conflict Resolution*”, op. cit.

<sup>58</sup> Diamond, I., “The Value of a Psychologist Mediator”, op.cit.

<sup>59</sup> Jacobs-May, J., “The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*”, op.cit.

brain are activated, and the other will generally reciprocate in kind.<sup>60</sup> Whereas when a disputant feels that the opponent is distrustful he may think that he is being treated unfairly and retaliate, causing the same reward centers of the brain to be activated as he punishes the opponent.<sup>61</sup> In such an event the negotiations come to a standstill.

Consequently, the mediation process requires us to recognize the hardwired nature of fairness and employ approaches that address the psychological questions at play. Approaches that can be employed to address psychological features of a conflict and guarantee fairness in mediation include understanding the parties, meeting their needs, assessing values, coming up with creative solutions and proposals from the mediator to allow parties to save face.<sup>62</sup>

A successful mediation can result in resolution of a conflict. This means that the parties agree on an outcome that they can live with. The conflict is resolved and does not come back. Resolution comes about as a result of a process that addresses all the aspects of the conflict including its psychological dimensions. It is as a result of these outcomes that are mutually acceptable that both parties feel that the solutions arrived at are legitimate. It has been postulated that when a problem is defined in terms of the parties' underlying interests, it is often possible to find a solution which satisfies both parties' interests. Indeed, it has been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.<sup>63</sup>

A process is likely to meet each party's expectations and achieve justice if it demonstrates a procedurally and substantively fair process of justice. This is because access to justice also includes how parties feel about the process. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level.<sup>64</sup>

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Smith, C.R., 'Mediation: The Process and the Issues,' *Current Issues Series*, (IRC Press, Industrial Relations Centre, Queen's University, Ontario, 1998), p. 6.  
Available at <http://irc.queensu.ca/sites/default/files/articles/mediation-the-process-and-the-issues.pdf> [Accessed on 1/08/2018].

<sup>63</sup> See Chapter 2 'Strategy and Tactics of Distributive Bargaining' p. 23,  
Available at [http://higherred.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960\\_chapter02.pdf](http://higherred.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf) [Accessed on 1/08/2018].

<sup>64</sup> Fisher, R., *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, p.21; See also D. Carneiro, *et al*, 'The Conflict Resolution Process,' *Law, Governance and Technology Series*, Vol. 18, 2014, pp. 163-186.

## **5. Conclusion**

Article 159 of the constitution of Kenya aims at easing access to justice through the use of reconciliation, mediation and traditional conflict resolution mechanisms. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level. A party must be able to have his feelings of anger, recognition, satisfaction and sense of justice addressed. A successful mediation has the capacity to restore a party's hopes, dreams and self-confidence. These characteristics of mediation should be exploited by Kenyans in appropriate cases.

Some of the cases where mediation can be effectively applied include those relating to the environment, communities, commercial matters, workplace issues, restorative justice, family disputes, among others.<sup>65</sup> In all these disputes the psychological processes at play are fairly similar. There is a need for the mediators to continually engage in continuous professional development seminars to enable them appreciate the relevant skills that they must acquire in their journey to becoming effective mediators. These skills include the ability to identify and address any psychological dimensions of the conflict in the mediation process. This is the only way that access to justice through mediation can be fully realised as a result of the satisfactory outcomes for the parties. The more satisfied the parties are with the process, the better and easier it will become for the integration of the use of mediation in conflict resolution in Kenya to ensure parties access justice as envisaged under Article 159 of the Constitution.

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<sup>65</sup> Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006); Stone-Molloy, M.S., "Mediating Environmental Conflicts: A Practical Manual", available at <http://www.law.ufl.edu/conservation/pdf/mediating.pdf> [Accessed on 1/08/2018]; Caratsch, C., *Resolving Family Conflicts: A Guide to International Family Mediation*, (International Social Service, Geneva, 2014). Available at <http://www.iss-usa.org/uploads/File/Guide%20to%20IFM.pdf>; Cornes, D., "Commercial Mediation: the Impact of the Courts", *Arbitration* Vol. 73, No.1, 2007, p.12.



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