African Traditional Justice Systems

Francis Kariuki*

1.1 Introduction

African traditional justice systems (hereinafter 'TJS') refer to all those mechanisms that African peoples or communities have applied in managing disputes/conflicts since time immemorial and which have been passed on from one generation to the other. TJS have also been described using other tags such as community, traditional, non-formal, informal, customary, indigenous and non-state justice systems. All these tags have often been used interchangeably in existing literature to describe localized and culture-specific dispute resolution mechanisms amongst peoples. Although, they have a huge potential for enhancing access to justice (particularly amongst groups that have been excluded from the formal justice system) in Africa, strengthen the rule of law and bring about development among communities,[1] numerous challenges arise in operationalizing them. In recent times, however, they have been recognized in law subject to some limitations making it difficult to describe them using some of the stated tags. Such recognition is borne out of the increasing acceptance of their validity and legitimacy,[2] as they are home-grown, culturally-appropriate, operate on minimal resources and are easily acceptable by the communities they serve.[3] Formal justice systems such as litigation and arbitration, employ legal technicalities and complex procedures, are expensive, not expeditious and are located in major towns, and are therefore not easily accessible by a majority of the people particularly the poor.

This paper discusses African TJS, their nature, current manifestations and challenges in Africa using Kenya as a case study. The paper contains seven (7) parts. Part 1 is this introduction which offers a definition of TJS and a general overview of the paper. Part 2 discusses the nature of African TJS and is followed by examples of institutions that entrench TJS in Africa in Part 3. The principles that undergird dispute resolution in Africa are explained in Part 4 of this discourse while

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* Francis Kariuki holds an LLB, LLM (University of Nairobi), Postgraduate Diploma in Law (Kenya School of Law), and MCIArb. He is an Arbitrator, an Accredited Mediator and a Lecturer at Strathmore University Law School.

[1] E. Hunter, 'Access to justice: to dream the impossible dream? *'The Comparative and International Law Journal of Southern Africa*, Vol. 44, No. 3 (November, 2011), pp. 408-427.

[2] M. Forsyth, 'A Typology of Relationships between State and Non-State Justice Systems,' *J. Legal Pluralism & Unofficial L.*, (2007), p.69.

[3] D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Harvard International Review, Vol. 32, No. 2* (Summer 2010), pp.32-36.

Part 5 discusses the Kenyan legal landscape and how it seeks to regulate TJS. Part 6 assesses some of the teething problems in dealing with TJS while Part 7 provides a conclusion and offers some recommendations on the way forward.

1.2 Nature of African TJS

Most TJS are embedded in African customary laws[4] and hence reflect traditional African norms and values.[5] They are part of the social fabric in Africa explaining their resilience to date. TJS are justice processes based on cooperation, communitarism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.[6] They involve the use of shared patterns of dispute resolution, conciliatory dialogue, the admission of guilt or wrongdoing, and 'compensatory concessions and a ritual commensality where food exchanges symbolise the end of animosities and the harmonious re-engagement of the flow of social life.'[7]

They can promote access to justice because they are: accessible by the rural poor and the illiterate people, flexible, voluntary, they foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process.[8] Most TJS are concerned with the restoration of relationships (as opposed to punishment), peace-building and parties' interests and not the allocation of rights between disputants.[9] In most of them, decisions are community-oriented with

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[4] Access to Justice in Sub-Saharan Africa, Penal Reform International 2000, p.11, available at http://www.gsdrc.org/docs/open/SSAJ4.pdf, accessed on 01/04/2014.

[5] However, it is worth noting that African customary law is not static but dynamic. Consequently, it is possible to find TJS that are not strictly speaking informed by old customs or traditions but modern or new customs and practices. For a detailed discussion on this see, Francis Kariuki, 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' *Alternative Dispute Resolution*, Vol. 3, No. 1 (2015), pp.163-183.

[6] Erin Sherry & Heather Myers, 'Traditional Environmental Knowledge in Practice' *Society & Natural Resources*, Vol. 15 No. 4 (2002), pp. 345-358, at p. 351. See Marguerite Johnston 'Giriama Reconciliation' Vol. 16 *African Legal Studies* (1978) at pp. 92-131(Johnson notes that the possibility of reconciliation is dependent on the disputants' broader social relationship, of which the dispute is but a partial reflection). See also Katherine K. Stich 'Customary Justice Systems and Rule of Law' *Military Law Review*, Vol. 221, (2014) pp. 215-256.

[7] Andrew McWilliam 'Meto Disputes and Peacemaking: Cultural Notes on Conflict and its Resolution in West Timor' *The Asia Pacific Journal of Anthropology,* Vol. 8 (2007), pp. 75-91 at p. 88.

[8] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), pp.202-228.

[9] Ibid, p. 204. See also ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011), p. 32; A.N. Allott, 'African Law,' in Derrett, J.D *An Introduction to Legal Systems*, (Sweet & Maxwell, 1968), pp. 131-156.

the victims, offenders (wrongdoer) and the entire community being involved and participating in the definition of harm (wrong doing) and in the search for a solution acceptable to all stakeholders.[10] For example, among the Gumuz, the Oromo and the Amhara living in the Metekkel region of Western Ethiopia have adopted a mechanism of *Michu* or friendship to resolve land disputes due to many immigrants in the area.[11] The aim of traditional dispute resolution by elders in Western Ethiopia, a tribal milieu, is not to punish the wrongdoers but to restore social harmony seeing that different tribes live side by side. The types of conflicts in the area include land boundary disputes, disputes over grazing area and cultural disputes especially due to intermarriages.[12]

They are legitimate and effective as they involve interactions, procedures and decisions that reflect people's culture.[13] As Ayinla documents, African traditions, beliefs, customs, practices, religions and values, regulate human affairs and are the basis of the system of administration of justice.[14] Because of social and religious sanctions, the compliance rate with decisions of TJS is higher than with formal justice systems.[15]

In addition, TJS are an aspect of the traditional 'commons' which refers to shared resources by a group of people[16] and an institutional framework regulating the right to access, use and control of resources.[17] As one of the design principles for effective common resource management,[18] TJS can be appropriate in ensuring and facilitating the rights of access, use and control of resources in

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[10] O.Oko Elechi, 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada. See also H. Zehr, *The Little Book of Restorative Justice*, (PA, Good Books, 2002).

[11] Linda James Myers & David H Shinn, 'Appreciating Traditional Forms of Healing Conflict and in Africa and the World,' *Black Diaspora Review* Vol. 2 No. 1, Fall 2010, p.7.

[12] Ibid.

[13] Gail Whiteman 'All My Relations: Understanding Perceptions of Justice and Conflict Between Companies and Indigenous Peoples' *Organization Studies* Vol. 30, (2009) at pp. 101-120; Bertha Kadenyi Amisi 'Indigenous Ideas of the Social and Conceptualising Peace in Africa' *Africa Peace and Conflict Journal* (2008) at pp.1-18; Peter Fitzpatrick 'Traditionalism and Traditional Law' *Journal of African Law*, Vol. 28, (1984) pp. 20-27, at p. 21; Carey N. Vicenti 'The re-emergence of tribal society and traditional justice systems' *Judicature*, Vol. 79 (3), (1995) pp. 134-141.

[14] L.A. Ayinla 'African Philosophy of Law: A Critique' 151, available at *http://unilorin.edu.ng/publications/African%20Philosophy%20of%20Law.pdf* accessed on 29 May 2016.

[15] Ibid.

[16] HWO Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' *University of Nairobi Law Journal* at (2003) 107-117.

[17] Yochai Benkler *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) at 116-118 available at *https://www.jus.uio.no/sisu/the_wealth_of_networks.yochai_benkler/portrait.a4.pdf* accessed on 29 May 2016.

[18] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Actions* (1990), at 90-102.

Africa today especially community resources. TJS are thus aptly suited in mediating issues of ownership and access to resources in Africa which are held communally and intergenerationally and some of it is sacred. Because they enjoy local legitimacy, they are appropriate fora that indigenous and local communities use in determining whether to grant or deny access to their resources.

1.3 Institutions used in Conflict Resolution

Whenever conflicts arise amongst African communities, parties often resort to negotiations and, in other instances, to the institution of council of elders or elderly men and women who act as third parties in the resolution of conflicts.[19] For instance, in relation to the *gacaca* system in Rwanda, it is reported that the initial conflict and problem resolvers were the headmen of the lineages or the eldest male or patriarchs of families who resolved conflicts by sitting on the grass together to settle disputes through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts.[20] The main aim of the *Gacaca* process was to ensure social harmony between lineages and social order throughout the Rwandan ethnicities. After the Rwanda Genocide, the Rwandan Government institutionalized *Gacaca* courts as a means to obtain justice and deal with a majority of the genocide cases that the formal Courts and International Criminal Tribunal for Rwanda (ICTR) could not handle. Institutionalization of the Gacaca Courts aimed at establishing the truth about the Rwandan Genocide, expedite proceedings against suspects of genocide, remove impunity, reconcile Rwandans and use Rwandan Customs to resolve their disputes.[21]

Similarly amongst the Tswana of Botswana it is documented that dispute resolution starts at the household *(lolwapa*) level.[22] If a dispute cannot be resolved at the household level, it is taken to the *Kgotlana* (extended family level) where elders from the extended family sit and listen to the matter. The elders emphasize mediation of disputes. If the *kgotlana* does not resolve the dispute, the disputants take the matter to *kgotla*, which is a customary court with formal court like procedures. It consists of the chief at the village level and the paramount chief at the regional

[19] Francis Kariuki *et al*, *Property Law*, Strathmore University Press, 2016, at 65.
[20] Bert Ingelaere, 'The Gacaca Courts in Rwanda' *Traditional Justice and Conflict Resolution After Violent Conflict: Learning From African Experiences*, Luc Huyse and Mark Salter (Eds) (IDEA, Stockholm, 2008), 33.
[21] Ibid, p. 38.
[22] Kwaku Osei-Hwedie and Morena J. Rankopo, *Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana*, p. 43.

levels. The chiefs are public officials and handle both civil and criminal matters. However, the customary court does not deal with land disputes as its role is merely advisory. The decision of the paramount chief is appealable to the customary court of appeal, which is the final court on customary matters and has the same status as the high Court.[23]

Amongst the Giriama people of Kenya there were two main dispute resolution institutions: the council of elders and the oracles. Two sets of council of elders existed. The first set was the senior age set known as the *kambi* that listened to normal and day-to-day complaints and resolved them.[24] The most revered set of council of elders was known as the *vaya*, which consisted of a few select elders who operated as a secret society. The *vaya* governed the whole of the Giriama community by determining planting and harvesting seasons, praying for rain, initiating of youth into age-sets.[25] The *vaya* also presided over trial by ordeals as oracles. Supernatural and superstitions played a great role in dispute resolution, especially in seeking and finding the truth. The Giriama used ordeals to determine the guilt or innocence of parties to a dispute through their reaction to the ordeals.[26] Two ordeals were common among the Giriama: ordeal by fire and ordeal by poison. The ordeal by poison made the guilty person sick while the ordeal by fire caused the guilty person to blister. The accused and the accuser often went to the ordeal together but sometimes the accused went alone to prove his innocence. The jurisdiction of elders among the Giriama was not physical but psychological.[27] Elders did not force anyone to appear before them, but such non-attendance was viewed as an admission of guilt. Parties were only subjected to trial by ordeal by their consent. The council of elders and trial by ordeals often operated as one process where ordeals and oracles determined who to blame and then the council of elders imposed duties and enforced rights.[28]

Amongst the Ameru people of Kenya there is a council of elders called *Njuri Njeke* which plays a key role in dispute resolution.[29] It is reported that the phrase *Njuri Ncheke* connotes a

[23] Ibid.

[24] Marguerite Johnson, 'Giriama Reconciliation,' *African Legal Studies*, Vol.16, (1978), p. 95. Retrieved from http://heinOnline.org on 16.03.2015

[25] Ibid.

[26] Ibid, 96.

[27] Ibid.

[28] Ibid.

[29] Alex N. Kamwaria *et al*, 'Recognizing and Strengthening the Role of the Njuri Ncheke in Devolved Governance in Meru County, Kenya' *Journal of Educational Policy and Entrepreneurial Research (JEPER)* Vol.2 No.12, (2015) pp. 42-47, at pp.43-44.

'selected council of adjudicators with a definite social role' and the members of the council are 'carefully selected and comprised mature, composed, respected and incorruptible elders of the community' because their work calls for greater wisdom, personal discipline, and knowledge of the traditions.[30] The *Njuri Njeke* council of elders receives complaints and summons parties who are free to submit to their jurisdiction or not.[31] Once a party refuses to submit to the *Njuri Ncheke* council of elders the council is supposed to refer the complainant to a court of law. In cases where there is deadlock, the *Njuri Ncheke* has mechanisms for breaking the deadlock such as performance of *Kithiri* curse or *Nthenge* oath.

1.4 Principles that undergird African TJS

Although TJS may vary from community to community, there are certain principles that run through most of them in Africa. First, conflict resolution is based on social or cultural values, norms, beliefs and processes that are understood and accepted by the community. This engenders legitimacy and high compliance rate with the decisions made. Second, there is high regard for truth and belief in ancestral powers, superstitions, charms, sorcery and witchcraft form a great part of dispute resolution and prevention mechanisms in traditional African societies.[32] For instance, among the Samburu, Turkana and Pokot communities there are indigenous warning systems about conflicts by looking at goat intestines and studying stars in the sky.[33] Moreover, traditional healers, diviners, herbalists, spiritual seers and healers played an important role in conflict resolution. Due to the respect, fear and reverence that these experts have in society, they play a crucial role in truth seeking. They also mediate between the living, ancestors and God. Conflicts arising from witchcraft are not resolved by the customary courts. They are regarded as private matters and hence privately resolved by traditional healers and affected parties. Consequently, the role of the spiritualists, especially in helping to identify suspected ritual murderers is prohibited by law.[34]

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[30] Ibid, p. 43.

[31] Per Makau J in *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012].

[32] Adeyinka A and Lateef B, 'Methods of conflict resolution in African traditional society' 8 *African Research Review: An International Multidisciplinary Journal*, Vol.8 No. 2 (2014).

[33] Ruto Pkalya, Mohamud Adan & Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet* (ed. Betty Rabar & Martin Kirimi, Intermediate Technology Development Group-Eastern Africa, 2004), p. 84.

[34] Kwaku Osei-Hwedie and Morena J. Rankopo, *Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana*, p. 45.

Third, respect for elders, ancestors, parents, fellow people and the environment is cherished and firmly embedded in the mores, customs, taboos and traditions amongst Africans. Commenting on the mediating role of elders, Jomo Kenyatta notes that:

> 'The function of an elder, both in his own family group and in the community, is one of harmonising the activities of various groups, living and departed. In his capacity of mediator his family group and community in general respect him for his seniority and wisdom, and he, in turn, respects the seniority of the ancestral spirits.'[35]

According to Bujo the admonitions, commandments and prohibitions of ancestors and community elders are highly esteemed as they reflect experiences which have made communal life possible up to the present.[36] Due to the respect accorded to elders, people avoid being in conflicting situations. Jomo Kenyatta documents how a man could not dare interfere with a boundary mark amongst the Gikuyu people, for fear of his neighbour's curses and out of respect. Boundary trees, lilies and demarcation marks were ceremoniously planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild animals, the two neighbours would replace it. But if they could not agree as to the actual place where the mark was, they could call one or two elders who after conducting a ceremony would replant the tree or lily.[37]

Fourth, the communal spirit of sharing and reciprocity, ensures mutual exchange of privileges, goods, favours, obligations, amongst most African communities and also fosters peaceful coexistence.[38] This eliminates the likelihood of disputes and conflicts, fosters relationships and a sense of togetherness. Conflicts and disputes have the potential to disrupt the social fabric holding society together and are thus avoided. Social values, and cultural norms and beliefs in place aim at avoiding conflicts, and ensuring that if conflicts arise they are resolved amicably.[39]

Other principles that aid elders in conflict resolution are social cohesion, harmony, openness/transparency, participation, peaceful co-existence, respect, tolerance and humility. Virtually all African communities depict adherence to these values explaining why TJS foster

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[35] J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), p. 255.

[36] B. Bujo, *The Ethical Dimension of Community-The African Model and the Dialogue between North and South*, (Paulines Publications Africa, 1998), pp. 198-202.

[37] J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.

[38] Ibid, pp. 38-41.

[39] See generally, Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' *Alternative Dispute Resolution*,' Vol. 3, No. 2 (2015), pp.30-53 at pp. 46-47.

reconciliation and social justice. This sharply differs with the western models of dispute resolution such as litigation and arbitration, which are individualistic and adversarial in nature.

1.5 Recognition of TJS in Kenya

Although TJS have severely been weakened, undermined and disregarded and their resilience across African States, and recognition in international and municipal instruments, illustrates that they still occupy a central place in the world of dispute resolution in Africa.[40] At the international level, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognises the rights of indigenous peoples and requires these rights to be determined in accordance with their own indigenous decision-making institutions and customary laws.[41] Likewise, the Brundtland Report notes that the recognition of traditional rights must go hand in hand with the protection of local institutions that enforce responsibility in resource use.[42] Moreover, the Rio Declaration[43] and the International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries,[44] require States to recognise and respect indigenous peoples customary laws and traditional decision making institutions.

Nationally, the role of TJS in promoting access to justice and better governance is increasingly being recognized in Kenya. Apart from being anchored on customary law, which is one of the sources of law in Kenya, traditional justice systems are explicitly recognized within formal laws.[45] Article 159 (2) (c) of the Constitution entreats the courts and tribunals in exercising judicial authority to be guided by *inter alia*, the principle that:

> '…alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3);'(own emphasis).

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[40] Ibid, p. 30. See also Francis Kariuki, 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

[41] See Article 26(3) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), G.A. Res 61/295, UN. Doc. A/61/295(2007). See also Articles 8 and 9, Convention on Biological Diversity, 31 *ILM*, 1992; Article 12 of the Nagoya Protocol.

[42] World Commission on Environment and Development *Brundtland Report* 1987 at 115-116.

[43] Principle 22 of the Rio Declaration on Environment and Development.

[44] Articles 8 & 9 International Labour Organization Convention 169 on Indigenous and Tribal Peoples in Independent Countries

[45] See generally the Constitution of Kenya 2010, Penal Code Cap. 63, Criminal Procedure Code Cap. 75, National Cohesion and Integration Act No. 12 of 2008 et cetera.

However, TJS are not to be applied in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.[46] But the Constitution does not limit the application of TJS to any area of the law. The 2010 Constitution allows for the use of TJS in the resolution of land and environmental disputes.[47] And due to the sensitivity of the land question in Kenya, TJS seem to be very appropriate as they would foster relationships and coexistence even after the dispute settlement. Courts have also recognised TJS. For example, in the case of *Lubaru M'imanyara v Daniel Murungi,*[48] parties filed a consent seeking to have the dispute referred to the *Njuri Ncheke* Council of Laare Division, Meru County and the court citing Articles 60(1) (g) and 159(2) (c) of the Constitution referred the dispute to the *Njuri Ncheke* noting that it was consistent with the Constitution. The consent reached by the parties was adopted as an order of the court.[49]

In relation to customary marriage disputes, the Marriage Act 2014 provides for the application of TJS over such disputes. According to Section 68(1) thereof;

> 'The parties to marriage celebrated under Part V may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.'

However, customary dispute resolution must conform to the principles of the Constitution.[50] Further, the person who takes parties through the process of conciliation or traditional dispute resolution must prepare a report of the process for the court.[51] Here, it seems that courts will play a supervisory role over customary dispute resolution processes to ensure compliance with the Constitution. But, who will be the dispute resolver in such an instance? Is it a traditional leader, a counsellor, family member, village elder or chief? Application of TDRM in customary marriages may contribute to enhanced access to justice by parties in customary marriages since most disputes touching on marriages have had to be handled by courts. Courts have not given customary law the

[46] Article 159(3), Constitution of Kenya 2010.

[47] Article 159(2)(c), 60(f), 67(2)(f), Constitution of Kenya 2010. See also ss 18 and 20(1) of the Environment and Land Court Act No. 19 of 2011 allowing the Environment and Land Court to adopt and implement Article 159 of the Constitution.

[48] Miscellaneous Application No. 77 of 2012. [2013] eKLR.

[49] Similarly in *Seth Michael Kaseme v Selina K. Ade,* Civil Appeal 25 of 2012; [2013]eKLR, the High Court recognised the role of the *Gasa* Council of Elders of Northern Kenya in dealing with land disputes.

[50] Section 68(2), *Marriage Act*, 2014.

[51] Ibid, section 68(3).

similar treatment as statutory law, and thus parties to customary unions could not have justice there.

In the African traditional set-up, disputes are not classed as either criminal or civil. Therefore, most communities have procedures for dealing with all matters that may disrupt social stability including criminal offences such as murder. As the Constitution does not prohibit the use of TJS in criminal matters, an important issue for consideration is determine when, how and under what circumstances they can apply in criminal cases.[52] Courts in Kenya have taken different views in the use of TJS to resolve criminal matters. For instance in *Republic v Mohamed Abdow Mohamed*[53] the High Court in Kenya discharged an accused person who had been charged with murder after the families of the accused and the deceased person had sat and some form of compensation paid 'wherein camels, goats and other traditional ornaments were paid to the aggrieved family' including a ritual that was performed to pay for the blood of the deceased to his family as provided for under the Islamic Law and customs.[54] Likewise, in *Republic v Juliana Mwikali Kiteme & 3 others*,[55] the High Court sought to promote reconciliation as envisaged in Article 159(2)(c) of the Constitution in a murder case. From the affidavits filed by the mother and brother of the deceased person, traditional compensation in the form of livestock had been paid in line with Kamba customs and traditions. Therefore, the prosecution on behalf of the Director of Public Prosecutions requested the court to discontinue the criminal proceedings under section 25 of the Office of the Director of Public Prosecutions Act of 2013 since the concerned families had been reconciled. The request for discontinuation of the proceedings was not opposed by the defence counsel and as a consequence the court discontinued the criminal proceedings and discharged all the accused persons under Article 157 of the Constitution and section 25 of the Office of the Director of Public Prosecutions Act 2013.

However, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[56] the accused was charged with murder but the court urged that the charge against the accused was a felony and 'as such reconciliation as a form of settling the proceedings is prohibited.' This was after the accused's

[52] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p.223.
[53] Per Lagat-Korir J in Criminal Case No. 86 of 2011 [2013] eKLR.
[54] Ibid.
[55] Criminal Case No. 10 of 2015 [2017]eKLR.
[56] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.

advocate submission that the two families had signed an agreement out of court in accordance with the Somali culture, law and religion and reconciled their minds and felt that the agreement ensured justice for them and the community.

In the Kenyan context, one can argue that if traditional justice systems are in compliance with Article 159(3) of the Constitution, there should be no bar to their applicability in criminal matters where the parties have so consented to their use because judicial authority emanates from the people. This position had received judicial imprimatur earlier in *Ndeto Kimomo v Kavoi Musumba* Law V.P stated as follows:-

> 'In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties were of course entitled to have their case decided in any lawful way they wished, by consent.' [57]

However, in *Dancan Ouma Ojenge v P.N. Mashru Limited* the Employment and Labour Relations Court in Mombasa noted that although superstition played a great role in dispute resolution especially in seeking and finding the truth, the use of traditional dispute resolution mechanisms in that case was repugnant to justice and morality, inconsistent with the Constitution and the Law. In this case, the Respondent company alleged the Claimant had stolen a computer box and resorted to terminate his contract unfairly and unlawfully upon receiving the opinion of a witchdoctor about the employee's guilt. The Respondent conducted investigation and disciplinary proceedings by ordeal which was conducted as follows:

> '…The witchdoctor carried some sticks. He held the sticks on one end, while the General Manager held the other end. The Employees were asked in turns, to place their hands between the sticks. If the witchdoctor declared the grip on the particular hand of an Employee, in between the sticks was strong, it was concluded the individual was guilty of stealing Respondent's computer box. The grip of the witchdoctor's sticks, on the hands of the Claimant, and on the hands of 3 other Employees, was declared to be strong. Consequently, the Respondent found them guilty of an employment offence.'[58]

My view is that the outcome in this case could have been different if the employee had consented to the investigation and disciplinary proceedings being carried out through trial by ordeal.

[57] [1977] KLR 170.

[58] Per James Rika J in Cause No. 167 of 2015 [2017] eKLR.

1.6 Challenges facing TJS in Africa

The first key challenge of dispute resolution by elders or any form of traditional justice system is the negative attitude they receive from 'modernized' Africans. Traditional practices such as rituals, cleansing, and trial by ordeals which are central in resolving disputes have been declared illegal under most legal systems. Similarly, in most countries in Africa including Kenya, South Africa and Ethiopia, there are laws proscribing witchcraft and traditional African practices despite their complementary role in dispute resolution.[59]

Secondly, African justice systems are regarded as inferior in comparison to formal justice systems. The inferiority is as a result of the subjugation of African customary law, which is the undergirding normative framework providing the norms, values, and beliefs that underlie traditional dispute resolution.[60] The repugnancy clauses which aimed at limiting the application of African customary law remain in the statute books of most African countries even in the post-independence era. In Kenya, for instance, Article 159(3) of the Constitution limits the use of traditional dispute resolution mechanisms using a repugnancy clause.[61]

Thirdly, modernity has had its fair share of negative impacts on African justice systems. In pre-colonial period, elders were the rich and wealthiest people as they held land and livestock. Their wealth and respect enabled them to be independent during dispute resolution processes. However, in modern societies, younger people have accumulated wealth and in most cases, older people rely on the younger people. This has enabled dispute resolution by elders to be affected by bribery, corruption and favoritism. For instance, there are reports that the *Abba Gada* elders of the Borana-Oromo and the *Sefer* chiefs of the Nuer community have been corrupted by bribes therefore limiting people's faith in them.[62]

TJS systems are threatened by modernization brought about by urbanization, a cash economy, and socio-economic, political and cultural changes[63] which are breaking down the close social ties and social capital between families and kinsmen. In addition, the superiority of the

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[59] Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' *Alternative Dispute Resolution*,' Vol. 3, No. 2 (2015), pp.30-53 at p. 50.
[60] Ibid, pp. 50-51.
[61] Ibid, p. 51.
[62] Gebreyesus Tekla Bahtu, *Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects,* p.115-116.
[63] Republic of Kenya, *The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions,* (Government of Kenya, 2009), para 4.3.4.

Westernized judicial and legal system has further reduced the influence elders have in resolution of disputes.

In addition, inadequate or unclear legal and policy framework on traditional dispute resolution mechanisms poses a major challenge to their application in contemporary African societies. Most African countries lack clear policies and laws on traditional dispute resolution mainly due to plurality of their legal systems. Even in countries such as South Africa where there is a legal framework for the application of traditional dispute resolution, there are still challenges and limitations in their usage.[64]

Another criticism levelled against TJS is that they are incapable of respecting and protecting the fundamental rights and freedoms of suspects (in criminal cases) and parties before such forums (especially women). But some have argued that this thinking is premised on a wrong assumption that pre-colonial Kenya did not have a concept of human rights.[65] In addition, Elechi asserts that there are greater opportunities for the achievement of justice within TJS than with the African state criminal justice systems because the former aims at the restoration of rights, dignity, interests and wellbeing of victims, offenders, and the entire community.[66]

Because of the evolving nature of customary law, traditional justice systems should not be legislated. TJS vary from community to community, and thus they would be challenges in coming up with a legislation harmonizing or consolidating different mechanisms. This may impede the growth of customary law and TJS. If there is need for regulation of TJS, it should be a framework law outlining the principles that such processes must comply with, e.g. fairness, non-discrimination and adherence to human rights standards. However, the regulatory framework on traditional justice systems must allow for their development.[67]

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[64] Christina Rautenbach, 'Traditional Courts as Alternative Dispute Resolution (ADR)-Mechanisms in South Africa' *SSRN*, 312-315.

[65] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p.217.

[66] O.Oko Elechi, 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.

[67] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p. 226.

1.7 Conclusion and way forward

In conclusion, it is worth noting that access to justice in Kenya remains a mirage for most people. As such, TJS as discussed above seem to hold a great potential and promise for enhancing access to justice amongst many people and may also help reduce the huge backlog of cases in courts since most disputes can be resolved locally. TJS are the most appropriate processes in rural areas and within informal settlements where people lack the financial wherewithal to access justice in formal justice systems. Within informal areas, communities could benefit a lot from locally-developed justice mechanisms that are sensitive to their plight, easily accessible and that dispense justice expeditiously. They can come up with frameworks for peace building, problem-solving, dispute resolution, improving community's way of life, community crime prevention, community policing and community defense.[68] Such justice mechanisms need not necessarily be informed by African customary law but by the current practices and customs of the people living in the informal settlement who may be from different ethnicities. It is reported that communities living in the informal settlements of Kibera and Mukuru slums have formed their own dispute resolution mechanisms that are independent of the state's formal dispute resolution mechanisms.[69] TJS have also been very effective in peace efforts in different parts of the country and are good forums for dialogue on matters affecting communities. However, for TJS to work for the African people, and Kenya in particular, a number of things ought to be taken into account, including:

(a) The need to develop a clear legal and policy framework for the application of TJS that ensures respect for human rights of parties, victims, offenders, communities but at the same time respects African customary practices and institutions.

(b) Placing emphasis on TJS, as the first port of call where applicable and relevant, in resolving disputes. Parties in certain personal relations such as marriage, divorce, child custody, maintenance, succession and related matters should first opt for TJS before approaching the formal justice systems.

(c) The need to give elders engaged in the process adequate remuneration to prevent chances and opportunity for corruption.[70] There are reports that corruption of elders in some communities influences the dispute resolution process.

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[68] D.K. Tharp & T.R. Clear, *Community Justice: A Conceptual Framework*, *Op. cit*, pp. 323-329.

[69] FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya* (FIDA Kenya, 2008), p. 4.

[70] This has to be done cautiously since it is clear that traditionally elders were not paid at all for their work.

(d) The need for a framework for appealing the decision of elders in the TJS. For instance, among the Tswana, the hierarchy of traditional dispute resolution mechanism begins at the household level, then goes to the extended family level, the a formal customary court, and lastly to the customary court of appeal, which has the same status as the High court.

(e) Caution in not incorporating TJS within the formal justice systems. TJS should be entirely voluntary, consensual and their decisions non-binding. In some jurisdictions, traditional customary courts have been established that allow for the application of customary law by experts in customs and traditions from different communities.[71]

(f) The need to develop an enforcement mechanism for TJS decisions. For instance, in South Africa, if a person fails to obey the decision of a traditional elder, the person is reported to a magistrate who gives the person 48 hours to show cause and if he fails to, he is punished.[72]

(g) African traditions and customs should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations.

(h) Need for research and codification of key concepts, practices and norms of different TJS to protect them and to ascertain where, when, how and under what conditions they operate[73] and to determine whether they comply with the thresholds set in the Constitution.

(i) Further, such codification increases uniformity and consistency of application of traditional dispute resolution mechanisms by elders.

(j) In addition, legal representation in traditional dispute resolution fora should be barred completely. A party should appear in person or be represented by a spouse, family member, neighbor or member of the community. Barring legal representation would safeguard these processes from legalities and technicalities applied in litigation. Further, the rationale for

[71] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), p.227.

[72] Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' *Alternative Dispute Resolution*,' Vol. 3, No. 2 (2015), pp.30-53 at p.53.

[73] Available at http://www.gsdrc.org/go/display/document/legacyid/98, (accessed on 13/08/14).

excluding legalities is that certain legal procedures such as cross-examination may be inconsistent with traditions, especially where the person being cross-examined is a senior male in the family or community.[74]

[74] Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, *Alternative Dispute Resolution*, Vol. 2, No. 1 (2014), pp.226-227.