

Making Mediation Work for all: Understanding the Mediation Process

Kariuki Muigua, Ph.D.

Making Mediation Work for all: Understanding the Mediation Process

Kariuki Muigua*

Abstract

This paper offers a general discussion on the process of mediation as a continuation of negotiation. The author critically discusses mediation process as consisting essentially of three phases: the preliminary/pre-negotiation, actual negotiation and post-negotiation phases, with a general outline of what parties and mediators should expect in each of the phases. This paper is meant to ensure that those not familiar with the process of mediation and the nascent practitioners get to understand the general outline of the mediation process, the specific roles and obligations of each of the players, as well as recommendations on the snares to avoid when seeking to conduct and achieve a successful mediation with acceptable outcome. Some of the issues in mediation are however as varied as the types of mediations, based on the different types of disputes and parties, as well as the training of the mediator in charge.

1. Introduction

This paper generally looks at the mediation process. Since the process of mediation is a continuation of negotiation, the phases of mediation resemble those of the negotiation process. Seminal writers on negotiation and mediation have discussed the respective processes as consisting essentially of three phases: the preliminary/pre-negotiation, actual negotiation and post-negotiation phases.¹ In this paper the writer discusses the mediation process as a three phase process.

This paper was informed by the desire to ensure that those not familiar with the process of mediation and the nascent practitioners get to understand the general outline of the mediation process, the specific roles and obligations of each of the players, as well as recommendations on the snares to avoid in order to conduct and achieve a successful mediation with acceptable outcome. It must, however, be pointed out that this paper does not by any means purport to

*PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [August, 2018].

¹ See generally, Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006); Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008).

address all the practice matters that may be encountered by a mediator since the problems may be as varied as the types of mediations, based on the different types of disputes and parties.

It should be noted that the negotiation and mediation processes are, to a large extent, similar. The main difference between negotiation and mediation is with the additional resources and expanded relationships and communication possibilities that a mediator brings to the conflict management forum. The entry of a mediator into a conflict transforms the structure of the conflict from a dyad into a triad and in this sense he becomes one of the parties to the conflict pursuing his own interests just as the other parties to the conflict.²

In discussing the mediation process, the writer takes cognisance of the fact that mediation is not a new concept in the conflict management discourse in this country. It is contended that it has been practiced since time immemorial.³ The discussion of the various phases of both negotiation and mediation as generally practiced will reveal that the two mechanisms are immensely informal. It is this informality that makes the two mechanisms expeditious, flexible, cost effective and autonomous. That is why most Kenyan communities could use these mechanisms in resolving their conflicts before the introduction of formal legal systems. Consequently and as contended in this paper, mediation can potentially be distorted by legalism out of a misapprehension of the fact that it is not a new concept in Kenya and that it yields better results in the informal perspective.⁴

2. The Negotiation Process

Negotiation is a voluntary process that allows party autonomy to come up with creative solutions, where two or more people of either equal or unequal power meet to discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁵

²Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.290; See also Meschievitz, C.S., "Mediation and Medical Malpractice: Problems with Definition and Implementation", *Law and Contemporary Problems*, Vol. 54, No. 1 in, *Medical Malpractice: Lessons for Reform*, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

³ Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu. [Accessed on 9/08/2018].

⁴ See Amendments to the Civil Procedure Act (Cap. 21) Laws of Kenya; See also *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015).

⁵ See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994); Fischer, R. & Ury, W., *Getting to Yes: Negotiating Agreement without Giving In*, (Penguin Books, New York, 1981), p.4.

Negotiation is considered to be part of mediation in that the negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.⁶ Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.⁷

2.1 Preliminary/Pre-negotiation Stage

The preliminary/preparation stage refers to all those activities that take place before the around-the-table negotiations. It is helpful to state right at the outset that the negotiation process predates the around-the-table negotiations and does not end there. Many writers on conflict management normally by-pass the preliminary/preparation and post-negotiation/implementation processes despite their importance in the conflict resolution discourse. It is important since it ensures that all the necessary preparations are done before the parties come to the table for negotiations. Parties will thus determine why they want to negotiate. They will determine what the conflict or dispute is. What do they want to negotiate about?⁸

The preparation/preliminary stage or the ‘pre-negotiation phase’ begins when the parties in conflict consider that their dispute can be resolved by negotiation and as such communicate their intention to negotiate to one another. This is the “diagnostic phase where the nature of the conflict is thoroughly examined before remedies can be essayed.”

This phase ends when parties agree to around-the-table negotiations or formal negotiations or when one party considers that negotiation is not the best option for the resolution of their dispute. Quintessentially, therefore, pre-negotiation is the span of time and activity in which the parties move from conflicting unilateral solutions for a mutual problem to a joint search for co-operative multilateral or joint solutions.⁹

⁶Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

⁷ Ibid.

⁸ Craver, C.B., “The Negotiation Process”, available at www.negotiator magazine.com, [Accessed on 9/08/2018].; See also Fischer, R., & Ury, W., *Getting to Yes: Negotiating Agreement without Giving In*, (Penguin Books, New York, 1981), pp. 13-20.

⁹ Zartman, I. W., “Pre-negotiation: Phases and Functions”, in *International Journal*, Vol. 44, No. 2, Getting to the Table: Process of International Pre-negotiation (Spring, 1989), pp. 237-253.

It is also at this stage that the parties formulate the agenda and discuss it before beginning the talks. The constituents and all others who will be involved in the negotiation process and their functions and authority are also identified at this stage. Each party or side of the negotiations have to obtain as much information about the other party and the constituents so as to get a picture of the other side and thus be in a position to assess their needs, interests, motivations and their goals. This stage thus reveals the positions of the parties, levels of divergence and matters over which the parties are in agreement. Parties' autonomy over the process is also evident at this phase, as it is at this stage that parties agree on how to set up a venue for the meeting. In an attempt to foster relations and ensure effective communications between the parties the mediator must establish direct contacts so as to aid in setting up the agenda.¹⁰

There are other important aspects of the pre-negotiation stage. For example, there are two functional needs that it addresses. First it ensures that the parties give their commitment to negotiating their differences and secondly it helps in identifying the problem in that parties identify and remove obstacles to negotiation. During this phase parties agree to negotiate and to arrange on how those negotiations are to be held.¹¹ The pre-negotiation stage does not address the design of an outcome as that will be discussed at the around-the-table talks, but focuses on process. It is, in effect, negotiation over process. Its subject matter will concern procedures, structures, roles, and agendas. One aim of pre-negotiation is to reach a joint definition of the problems and subject matter that will have to be addressed - but it does not tackle those issues beyond defining them for future reference. Pre-negotiation can shade into negotiation if it goes extremely well, or substantive negotiation may need to recede back to procedural pre-negotiation temporarily. Pre-negotiation can take place even if there is no intention to move on to full negotiations.¹²

In summary, therefore, the major elements to be pre-negotiated from the hugely complex to the straightforward ones are: agreeing on the basic rules and procedures; participation in the process, and methods of representation; dealing with preconditions for negotiation and barriers to dialogue; creating a level playing-field for the parties; resourcing the negotiations; the form of

¹⁰ Sourced from www.negotiations.com, [Accessed on 9/08/2018].; See also Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op.cit, pp.113-115.

¹¹ Saunders, H.H., "We Need a Larger Theory of Negotiation: The Importance of Pre-negotiating Phases." *Negotiation Journal*, Vol.1, No. 3 (1985), pp. 249-262.

¹² Available at www.cibera.de, [Accessed on 9/08/2018].

negotiations; venue and location; communication and information exchange; discussing and agreeing upon some broad principles with regard to outcomes; managing the proceedings; timeframes; decision-making procedures; process tools to facilitate negotiations and break deadlocks; and the possible assistance of a third party.¹³

In the traditional African context, the pre-negotiation phase is best exemplified by the negotiation preceding marriage negotiations where beer could be brewed and food shared in preparations of the actual negotiations. In case of disputes, rituals could be performed to appease the spirits such as beer brewing and slaughtering of goats. The disputants could then eat together as a sign of their willingness to have the matter resolved amicably.¹⁴

2.2. Negotiation Stage/Actual Negotiations/Across-the-table Negotiations

This is the stage at which parties discuss and make bargains over the issues they may have framed. Parties discuss the issues in their conflict to either agree or disagree. Parties develop the foundation of their agreement by framing the issues. The core issues of the conflict are put together so as to understand the basic concept of the agreement parties are seeking. Parties consider creative solutions or options and discuss concessions. They advance proposals and counter-proposals, back and forth, until some manner of tentative agreement is reached.¹⁵

2.3 The Post-Negotiation/Implementation Stage

At this level, the parties discuss on how they can codify the agreement arrived at by formulating an action plan with specific timelines for effective implementation of the agreement and is thus a very important phase. It is aimed at making the agreement realistic so that it is not only viable but also workable. The commitment of the parties towards the negotiated agreement is tested at this phase. If the agreement cannot be acceptable to the constituents in the negotiation process then the agreement becomes impossible to implement. In diplomatic negotiations, the

¹³ Ibid.

¹⁴ Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, A Division of Random House, New York), pp. 179-221.

¹⁵ Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018]; See also www.negotiations.com, [Accessed on 9/08/2018].

implementation stage involves crucial processes such as ratification of agreements and treaties signifying the parties' intention to be fully bound by the treaty they have negotiated over.¹⁶

3. The Mediation Process

As already stated in the foregoing discussions, mediation is a continuation of negotiation and its phases resemble those of the negotiation process. Consequently, this section looks at what tasks are done in the various stages that is in the pre-negotiation, negotiation and post-negotiation stages in mediation.

3.1 Pre-Negotiation Stage

In this stage, the following tasks must be looked into by the parties: they must decide whether to engage in negotiation or mediation; mediator's identity should be floated and accepted or rejected; the mediator gives the background of the conflict; mediator decides whether to act as mediator in the conflict; the mediator must ascertain that the conflict is ripe for resolution. The role played by the USA in the Israeli-Lebanese conflict outlines clearly the role of a mediator in the pre-negotiation phase in that conflict.¹⁷

The pre-mediation preparation for the mediation sessions should be treated as a joint responsibility to be undertaken by the parties, their lawyers, if any, and the mediator, since the successful conduct of the same relies on all of them.¹⁸ It has also been suggested that since in mediation the dispute resolution practitioner determines the phases of the process to be conducted, the process may be sequential, starting with a series of private meetings, such as a pre-mediation and intake interview to establish if the case is suitable for such a process and to assess the willingness of the parties to negotiate in a constructive way.¹⁹

¹⁶ Zartman, I. W. & Berman, M. R., *The Practical Negotiator*, (New Haven, CT: Yale University Press, 1982), pp. 42-87; Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit, pp.113-114.

¹⁷ Inbar, E., Great Power Mediation: The USA and the May 1983 Israeli-Lebanese Agreement, *Journal of Peace Research*, Vol. 28, No. 1, Special Issue on International Mediation(Feb., 1991), pp. 71-84; see also, www.colorado.edu, [Accessed on 9/08/2018].; See also www.negotiations.com, [Accessed on 9/08/2018].

¹⁸ Cobb, C., 'Reflections on the Mediation Process: Ensuring a Successful Mediation,' June 13, 2017. Available at <http://milesmediation.com/reflections-on-the-mediation-process-ensuring-a-successful-mediation/> [Accessed on 9/08/2018].

¹⁹ 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. 199.

Apart from court annexed/mandated mediation²⁰, it is generally agreed that the number of sessions, their duration and the purpose of each session can be tailored to the requirements of the case and the approach favoured by the mediator and the parties.²¹

3.2 Negotiation Stage

At this stage, the possible strategies to use in the negotiations are discussed. Unlike in courts and in arbitration where the judges and arbitrators give orders and directions to be followed, a mediator's role in mediation is non-directive. This is so because in mediation party autonomy implies that, parties have a say over the process and outcome of the process. Therefore, where a mediator imposes his or her views upon the parties, the outcome may not be acceptable and enduring. A mediator's role at this stage should thus be essentially one of aiding

²⁰ The Mediation Accreditation Committee (MAC) developed a Code of Ethics that is to apply to all mediators taking part in the pilot program of the the court annexed mediation, and the same is expected to remain in force even after the program was rolled out to the rest of the country in May 2018. The mediation (Pilot Project) Rules, 2015 lays out the procedures and timelines for guiding the process under the Court Annexed Mediation. (Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015)). The *Mediation (Pilot Project) Rules, 2015*, also provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.

The mediation process within Court Annexed Mediation

Screening of Files: In this stage, the file is presented before the Mediation Deputy Registrar (MDR) who determines which cases are to be referred for Mediation. The matters referred to mediation are those with disputes relating to facts and not of law, few disputed facts and those that are not complex in nature.

Parties Notified of the Decision: When the Mediation Deputy Registrar (MDR) makes a decision for a case to be referred to mediation, the MDR notifies the parties of this decision within seven (7) days.

Case Summaries: The parties are, within 7 days of receipt of notification to file Case Summaries.

Nomination of Accredited Mediators: The MDR will then nominate three (3) mediators from the Mediation Accreditation Committee Register and notify the parties of the names.

Parties Respond: Parties respond by stating their preferred mediators in writing. The MDR will appoint a mediator to handle the case. Parties are notified about mediation.

Notification of Appointed Mediators: The MDR shall within 7 days of receipt of notice of preference of mediators appoint a mediator and notify the parties.

Appointed Mediator responds: Upon receipt of the notification, the mediators are expected to file their response.

Mediation Begins: The appointed mediator will schedule a date for initial mediation and notify the parties of the date, time and place. The mediation proceedings will be concluded within sixty (60) days from the date it is referred for mediation. However, this period may be extended for a further ten (10) days.

Filing of report: Upon completion of mediation, the mediator is expected to file a report which indicates whether or not a Mediation Settlement agreement was reached.

The mediator shall file a certificate of non-compliance where a party fails to comply with any of the mediator's directions or constantly fails to attend mediation sessions.

²¹ ICC Commission on Arbitration and ADR, *Mediation Guidance Notes*, ICC Publication 870-1 ENG, (International Chamber of Commerce, France, 2015), p.6.

the parties to negotiate and come to agreeable, creative and acceptable solutions that they are happy to live with. This is the essence of autonomy and voluntariness in mediation process.²²

There are several *active listening techniques* at the disposal of a mediator that can be employed to help the parties come up with a solution to the conflict. These include: paying attention, listening attentively, listening to the voice of silence/what is not said, encouraging parties, clarifying /paraphrasing/backtracking/restating, reframing²³, reflecting, summarizing and validating. To be an active listener the mediator must ensure that he does not pay attention to his own emotions; should react to ideas and not a person; must recognize own prejudices; must avoid assumptions/judgments; use non-verbal behavior to show understanding and acceptance; show empathy; rephrase/ restate/reframe key thoughts and feelings and must conduct caucuses²⁴.

It is also recommended that mediators should have very well-developed communication skills. Some of the *non-verbal communication techniques* that a mediator must display in the mediation process are: maintaining frequent eye contact with the parties; body movements such as nodding and positioning; voice tone; keeping body oriented towards the speaker and showing a genuine curiosity to whatever is being said.

Mediators are encouraged to have the ability to get the parties to talk to each other, as well as ‘understanding when it may be necessary to allow the parties to save face and walk away with the settlement and their pride intact’.²⁵

As a way of management of interruptions during mediation process, it has been suggested that during the mediator’s opening statement, the mediator should insure that the parties understand and agree to the guideline that each party lets the other speak without interruption during the mediation.²⁶

²² See article by Federation of Women Lawyers, ‘Mediation in Kenya’, published in the Daily Nation newspaper at page 42 on 20/06/2012. FIDA has successfully mediated in many family conflicts in Kenya where parties do not want to go to court. Parties result to mediation since it is informal, flexible, confidential (especially in family disputes), voluntary, fosters relationships and gives the parties autonomy over the process.

²³ The mediator uses this technique as a way of reciting back or neutrally paraphrasing the statements of the parties in order to demonstrate understanding of whatever they are saying.

²⁴ Caucuses are private sessions that the mediator may have with a party to the dispute so as to get more information or clarity on a particular issue.

²⁵ 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 9/08/2018].

²⁶ Carbone, M.P., ‘Mediation Strategies: A Lawyer’s Guide to Successful Negotiation.’ Available at <http://www.mediate.com/articles/carbone7.cfm#comments> [Accessed on 9/08/2018]; ‘Module 4: Issues In Mediation,’ available at <http://www.ama.asn.au/wp-content/uploads/2012/07/MODULE-4.pdf> [Accessed on 9/08/2018].

This may be achieved through various ways which include but not limited to: the use non-verbal cues to indicate the interrupter should cease; ignore the interruption; stop the process and address the interrupter; or where it is difficult to proceed, the mediator needs to consider whether the parties need to be separated so that the process can continue or whether the mediation untenable.²⁷

These techniques allow the mediator to know and meet the parties' needs; make proposals which allow both parties to save face and enter an agreement that neither is willing to propose and come up with creative solutions to the conflict.

3.3. Post-Negotiation Stage

In the negotiation process, we have seen that the post-negotiation phase is the most important in the whole process. Similarly, in the mediation process this is the case too. It is during this stage that what was negotiated is implemented.

After parties have arrived at an acceptable, enduring outcome or solution the negotiators and the mediator have to come up with a method or strategy for effectuating that outcome. The criteria could, for instance, include assigning roles to the parties and a timeframe within which certain roles are to be carried out. And it is at this stage that parties find out if the negotiations were done in good faith and whether the other party will deliver on the promises it made during the negotiation stage. This is possible through monitoring. This stage also creates a forum for building and mending broken relationships, since mediation is a mechanism geared towards fostering relationships rather than creating tensions.²⁸

3.4 Mediation Approaches and Techniques

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

²⁷ Knight, R., 'How to Refocus a Meeting after Someone Interrupts,' *Harvard Business Review*, 16 April, 2015. Available at <https://hbr.org/2015/04/how-to-refocus-a-meeting-after-someone-interrupts> [Accessed on 9/08/2018]; See also generally, Macmillan, R., *A Practical Guide for Mediators*, (Macmillan Keck Attorneys & Solicitors, Geneva). Available at <http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf> [Accessed on 9/08/2018].

²⁸ Zartman, I. W. & Berman, M. R., *The Practical Negotiator*, op. cit; See generally, Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018].

purposes and operates in a variety of social and legal contexts. As such, the mediator usually possesses different types of training, cultural backgrounds, skills levels and operational styles. These factors all contribute to the challenge of trying to define and describe mediation practices.²⁹ For example, in traditional African society, several societal factors such as traditions, norms, kinship ties, joking relations, communal living and respect were instrumental in conflict management. In the traditional set up, mediation was seen as an everyday affair and an extension of a conflict management process on which it is dependent.³⁰ Mediation in the traditional setting thus operated and functioned within the wider societal context in which case it was influenced by factors such as the actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves.³¹ It is thus not a linear cause-and-effect interaction but a reciprocal give and take process. This reciprocity is the one that created an ideal environment for conflict resolution among African communities as it involved the mutual exchange of privileges, goods, favours and obligations thus fostering peaceful coexistence and eliminating the likelihood of wars and conflicts. It influences and is, in turn, influenced and responsive to the context and environment of the conflict.³²

Since it is now acknowledged that conflict management is a more complex social phenomenon than earlier conceptualized, there is consensus that there are other factors and actors who have interests that influence the mediation process beyond the parties themselves. Such a wide environment in which the immediate parties to the conflict, mediator's constituents, and third parties who affect or are affected by the process and outcomes of the mediation and other factors such as societal norms, economic pressures, and institutional

²⁹ Drews, M., 'The Four Models of Mediation,' *DIAC Journal- Arbitration in the Middle East*, Vol.3, No. 1(1), 2008, p.44. Available at

<http://www.diac.ae/idias/journal/volume3no1/issue1/eng4.pdf> [Accessed on 9/08/2018].

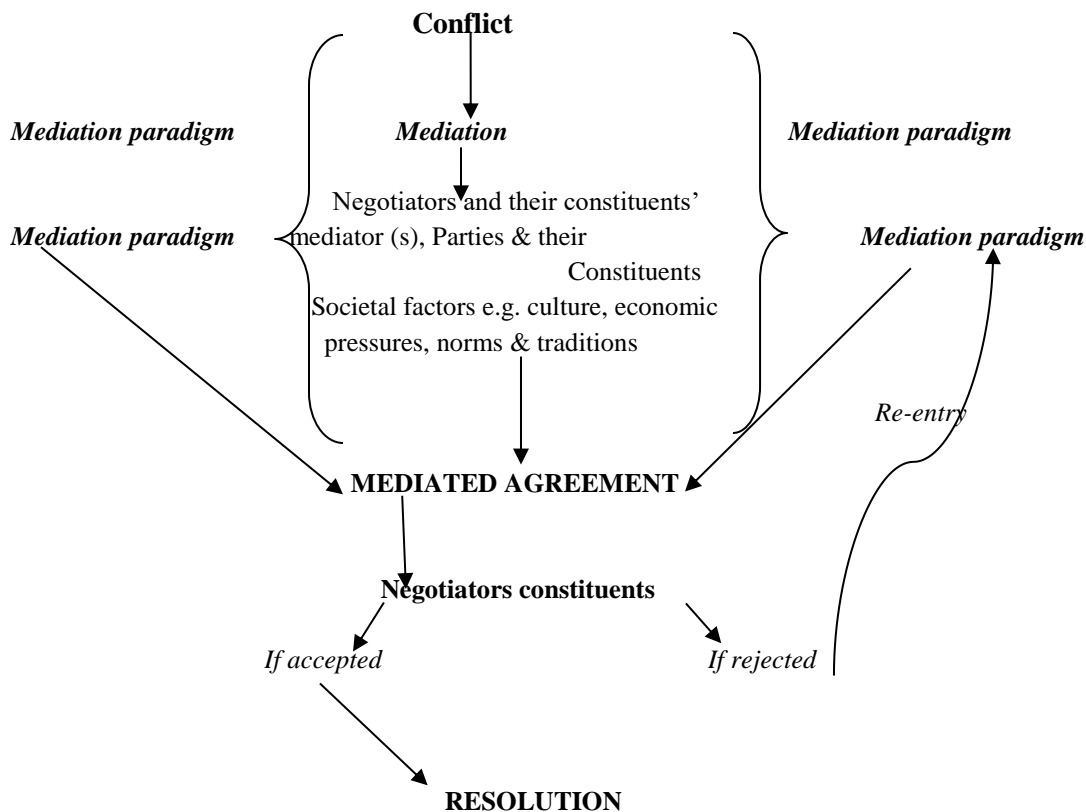
³⁰ See Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," op cit.; Wegru, J.Y., "The Dagaaba-Frafra Joking Relationship," *Folklore*, Vol.14, 2000, pp.86-97; Parkin, R., "The Joking Relationship and Kinship: Charting a Theoretical Dependency," *Journal of the Anthropological Society of Oxford*, Vol.24, 1993, 251-263; Davidheiser, M., "Special Affinities and Conflict Resolution: West African Social Institutions and Mediation," *Beyond Intractability* (2005). Available at https://www.researchgate.net/profile/Mark_Davidheiser/publication/265063587_Special_Affinities_and_Conflict_R esolution_West_African_Social_Institutions_and_Mediation/links/5621990a08aed8dd1943e828.pdf [Accessed on 9/08/2018]; De Jong, F., "A joking nation: conflict resolution in Senegal," *Canadian Journal of African Studies/La Revue canadienne des études africaines*, Vol.39, No. 2, 2005, pp.391-415.

³¹ "The Cognitive Perspective on Social Interaction," available at https://www.ocf.berkeley.edu/~7Ejfkhlstrom/SocialCognitionWeb/CogPerspect/CogPerspect_supp.htm [Accessed on 9/08/2018].

³² See Baregu, M., "Understanding Obstacles to Peace: Actors, Interests, and Strategies in Africa's Great Lakes Region," (International Development Research Centre, 2011). Available at <https://prd-idrc.azureedge.net/sites/default/files/openebooks/516-8/> [Accessed on 9/08/2018].

constraints directly or indirectly affecting the mediation process is what is referred to as the mediation paradigm.³³ [See Fig. 1 below for an illustration of the mediation paradigm]. However, the concept has now been extended further to include sources of the benefits for the parties and third parties such as a mediator which are located in the conflict, region where conflict arose, international audience / neighbours, parties and third party constituents.³⁴

Fig.1 Mediation Paradigm



***Source: The author.**

Fig. 1.2 illustrates the mediation paradigm with some of the main actors, that is, the conflict, negotiators and their constituents, the mediators, third parties and their constituents and other societal factors that influence the mediation process. It further reveals that the constituents are normally interested in the mediated agreement. This is because, if the negotiators do not consult

³³ Wall, Jr, J.A., “An Analysis, Review, and Proposed Research”, *The Journal of Conflict Resolution*, Vol. 25, No.25 [March., 1981], pp.157-180.

³⁴ Mitchell, C., “*The Motives for Mediation*,” in Mitchell, C.R. & Webb, K. (eds), *New Approaches to International Mediation* (Westport, CT: Greenwood Press, 1988), pp. 29-51; Mwangiru, M., *The Water’s Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), pp.43-54.

them sufficiently they may reject the agreement leading to the re-entry problem. However, where there are adequate consultations with the constituents the negotiators will find that the agreement they negotiated is acceptable and hence an end to the conflict.

The mediation paradigm is thus useful in understanding the conflict context. The context of the conflict is the wider context, the societal aspects to the conflict reflecting the nature of the disagreement, the parties' perceptions of it, and the level and type of their conflict behavior.³⁵

There are about four 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; Evaluative mediation- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court remedies.³⁶

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:³⁷

- a. First, there needs to be 'an impartial third party facilitator' who helps the parties explore the alternatives and find a satisfactory resolution;
- b. 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;

³⁵Bercovitch, J. & Houston, A., "Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts", *The Journal of Conflict Resolution*, Vol. 44, No. 2 (Apr., 2000), pp. 170-202; Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965); Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu, [Accessed on 9/08/2018]; See generally Report by Mohamud, A, et al (eds), *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (Practical Action, Nairobi, 2006).

³⁶ 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.

³⁷ Marsh, Stephen R. 1997a. What is mediation? Available at <http://members.aol.com/ethesis/mw1/adr1/essayi.htm> [Accessed on 9/08/2018], (As quoted in Smith, C.R., 'Mediation: The Process and the Issues,' (Industrial Relations Centre, Queen's University Kingston, Ontario, 1998), p.3.

- c. Third, there must be ‘good faith from the participants’ or the process will soon be frustrated and fail;
- d. 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; and
- e. Finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.

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.’³⁸

4. Facilitative Role of the Non-Mediator Lawyers in the Mediation Process

It has been suggested that where a party goes with a non-mediator lawyer in the mediation process, such a lawyer can perform various facilitative roles ranging from the referring clients to mediation, helping during the mediation process, reviewing a mediated agreement, and communicating with the mediator.³⁹

In addition, in deciding whether or not to refer clients to mediation, such lawyers should assess the personality, capabilities, and motives of clients to determine whether they would appropriately contribute to and profit from mediation.⁴⁰

The lawyer may also participate in selecting a mediator or providing clients with a list of reputable mediators.⁴¹ Other roles include but not limited to: remaining available to clients to provide information and advice without depriving clients of autonomy in the mediation process;

³⁸ 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.

³⁹ See generally, Samuels, M. D. & Shawn, J.A., “The role of the lawyer outside the mediation process,” *Conflict Resolution Quarterly*, No. 2, 1983, pp.13-19.

⁴⁰ Ibid.

⁴¹ Ibid.

and advising clients about the enforceability of the decisions being made and the need for security to ensure the integrity of the agreement.⁴²

It has also rightly been pointed out that the wise lawyer takes care to understand the scope of the protection the law affords to statements made and acts done in connection with settlement negotiations.⁴³

It is therefore arguable that lawyers can play a facilitative role in mediation without interfering with either the mediator's role or jeopardizing the parties' ability to resolve their issues.

5. Conclusion

This paper has discussed the mediation process as a continuation of the negotiation process. It is an informal, flexible, voluntary and expeditious process. This is the sense in which mediation was practiced by Kenyan communities before the advent of formal legal mechanisms. The paper however highlights the general elements of a mediation process that is broad enough for all the mediators to incorporate. Regarding the specific elements of the process, that will greatly depend on the mediator, their training, nature of dispute and parties, amongst others.

As outlined above, mediation may involve the three phases the preparatory stages, actual negotiations and the implementation stage. However, they are not cast in stone. They are not fixed procedures as happens in court. They allow flexibility during the negotiations and the mediation. Conflict resolution in the traditional African set up was such a process and most of these phases were involved albeit in an unconscious manner.

As seen above, the mediation process involves other constituents and not just the parties to the conflict. It has been suggested that it includes the mediator, constituents of the parties, constituents of the mediator and the third parties who affect or are affected by the process and outcome of the mediation. Furthermore, this environment also includes other factors such as societal norms, economic pressures and institutional constraints which affect the mediation process and the outcome either directly or indirectly.⁴⁴

⁴² Ibid.

⁴³ Brazil, W.D., "Protecting the Confidentiality of Settlement Negotiations," *Hastings Lj*, No. 39, 1987, pp. 955-1029 at 955.

⁴⁴ Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution*, Vol. 25, No.25 [March., 1981], pp.157-160.

Since Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs) are now enshrined in the Constitution, their positive attributes should now be harnessed to foster peaceful co-existence and enhance access to justice in Kenya. It is thus hoped that the policy, legal and institutional framework on resolution of conflicts in Kenya is bound to shift to encourage ADR and other traditional means of conflict management. It thus becomes imperative for the practitioners to appreciate the minimum accepted ingredients of mediation process to enhance the process and acceptability of the outcome by the parties.

References

- ‘Module 4: Issues in Mediation,’ available at <http://www.ama.asn.au/wp-content/uploads/2012/07/MODULE-4.pdf> [Accessed on 9/08/2018].
- “Negotiations in Debt and Financial Management”, *United Nations Institute of Training and Research*, (UNITAR), (December 1994).
- Bercovitch, J. & Houston, A., “Why Do They Do It like This? An Analysis of the Factors Influencing Mediation Behaviour in International Conflicts”, *The Journal of Conflict Resolution*, Vol. 44, No. 2 (Apr., 2000), pp. 170-202.
- Bercovitch, J., “Mediation Success or Failure: A Search for the Elusive Criteria”, *Cardozo Journal of Conflict Resolution*, Vol.7, 289.
- 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.
- Brazil, W.D., "Protecting the Confidentiality of Settlement Negotiations," *Hastings Lj*, No. 39, 1987, pp. 955-1029.
- Carbone, M.P., ‘Mediation Strategies: A Lawyer’s Guide to Successful Negotiation.’ Available at <http://www.mediate.com/articles/carbone7.cfm#comments> [Accessed on 9/08/2018].
- Civil Procedure Act (Cap. 21) Laws of Kenya.
- Cobb, C., ‘Reflections on the Mediation Process: Ensuring a Successful Mediation,’ June 13, 2017. Available at <http://milesmediation.com/reflections-on-the-mediation-process-ensuring-a-successful-mediation/> [Accessed on 9/08/2018].

Craver, C.B., "The Negotiation Process", available at www.negotiormagazine.com, [Accessed on 9/08/2018].

Davidheiser, M., "Special Affinities and Conflict Resolution: West African Social Institutions and Mediation," *Beyond Intractability* (2005). Available at https://www.researchgate.net/profile/Mark_Davidheiser/publication/265063587_Special_Affinities_and_Conflict_Resolution_West_African_Social_Institutions_and_Mediation/links/5621990a08aed8dd1943e828.pdf [Accessed on 9/08/2018].

De Jong, F., "A joking nation: conflict resolution in Senegal," *Canadian Journal of African Studies/La Revue canadienne des études africaines*, Vol.39, No. 2, 2005, pp.391-415.

Drews, M., 'The Four Models of Mediation,' *DIAC Journal- Arbitration in the Middle East*, Vol.3, No. 1(1), 2008, p.44. Available at <http://www.diac.ae/ideas/journal/volume3no1/issue1/eng4.pdf> [Accessed on 9/08/2018].
Federation of Women Lawyers, 'Mediation in Kenya', published in the Daily Nation newspaper at page 42 on 20/06/2012.

Fenn, P. *Introduction to Civil and Commercial Mediation*, Part 1 (Chartered Institute of Arbitrators).

Fischer, R. & Ury, W., *Getting to Yes: Negotiating Agreement without Giving In*, (Penguin Books, New York, 1981).

Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018].

ICC Commission on Arbitration and ADR, *Mediation Guidance Notes*, ICC Publication 870-1 ENG, (International Chamber of Commerce, France, 2015).

Inbar, E., Great Power Mediation: The USA and the May 1983 Israeli-Lebanese Agreement, *Journal of Peace Research*, Vol. 28, No. 1, Special Issue on International Mediation (Feb., 1991), pp. 71-84.

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

Knight, R., 'How to Refocus a Meeting after Someone Interrupts,' *Havard Business Review*, 16 April, 2015. Available at <https://hbr.org/2015/04/how-to-refocus-a-meeting-after-someone-interrupts> [Accessed on 9/08/2018].

Macmillan, R., *A Practical Guide for Mediators*, (Macmillan Keck Attorneys & Solicitors, Geneva). Available at

<http://www.macmillankeck.pro/media/pdf/A%20Practical%20Guide%20for%20Mediators.pdf>
[Accessed on 9/08/2018].

Marsh, Stephen R. 1997a. What is mediation? Available at
<http://members.aol.com/ethesis/mw1/adr1/essayi.htm> [Accessed on 9/08/2018].

Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015).

Meschievitz, C.S., "Mediation and Medical Malpractice: Problems with Definition and Implementation", *Law and Contemporary Problems*, Vol. 54, No. 1 in, *Medical Malpractice: Lessons for Reform*, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

Mitchell, C., "The Motives for Mediation," in Mitchell, C.R. & Webb, K. (eds), *New Approaches to International Mediation* (Westport, CT: Greenwood Press, 1988), pp. 29-51.

Mkangi, K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu, [Accessed on 9/08/2018].

Mohamud, A and Ruto, P., *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (Practical Action, Nairobi, 2006).

Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006).

Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008).

Parkin, R., "The Joking Relationship and Kinship: Charting a Theoretical Dependency," *Journal of the Anthropological Society of Oxford*, Vol.24, 1993, 251-263.

Samuels, M. D. & Shawn, J.A., "The role of the lawyer outside the mediation process," *Conflict Resolution Quarterly*, No. 2, 1983, pp.13-19.

Saunders, H.H., "We Need a Larger Theory of Negotiation: The Importance of Pre-negotiating Phases." *Negotiation Journal*, Vol.1, No. 3 (1985), pp. 249-262.

Smith, C.R., 'Mediation: The Process and the Issues,' *Current Issues Series*, (IRC Press, Industrial Relations Centre, Queen's University, Ontario, 1998). Available at <http://irc.queensu.ca/sites/default/files/articles/mediation-the-process-and-the-issues.pdf>
[Accessed on 9/08/2018].

Wall, Jr, J.A., "An Analysis, Review, and Proposed Research", *The Journal of Conflict Resolution*, Vol. 25, No.25 [March., 1981], pp.157-160.

Wegru, J.Y., "The Dagaaba-Frafra Joking Relationship," *Folklore*, Vol.14, 2000, pp.86-97.

Zartman, I. W. & Berman, M. R., *The Practical Negotiator*, (New Haven, CT: Yale University Press, 1982).

Zartman, I. W. & Berman, M. R.,*The Practical Negotiator*, op. cit; See generally, Horst, P.R., "Cross-Cultural Negotiations," A Research Report Submitted to the Faculty In Partial Fulfillment of the Graduation Requirements (2007), available at www.au.af.mil, [Accessed on 9/08/2018].

Zartman, I. W., "Pre-negotiation: Phases and Functions", in *International Journal*, Vol. 44, No. 2, Getting to the Table: Process of International Pre-negotiation (Spring, 1989), pp. 237-253.