

# Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems

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## **Abstract**

*For a long time, the jurisprudence emanating from Kenyan courts has treated African customary law as an inferior source of law in comparison to formal laws. Consequently, certain customary practices and traditions that can foster social justice and peaceful coexistence amongst communities such as traditional justice systems had not been formally recognized in law. However, the 2010 Constitution recognizes customary law and the use of traditional dispute resolution mechanisms in resolving disputes. It also protects the culture and other cultural expressions of the people. This recognition is important because of the close interlink between traditional justice systems and customary law. In this paper, an examination of previous court decisions dealing with customary law is attempted to glean courts approach to customary law in the past and whether it can influence the application of traditional justice systems in enhancing access to justice. The paper posits that the way courts have interpreted customary law since the advent of colonialism may be a barrier to the application of traditional justice systems. A need therefore arises for courts to develop a jurisprudence that is supportive of customary law and traditional justice systems. A change of mindset and perceptions amongst judges, lawyers and the wider citizenry towards customary law is required if traditional justice systems are to contribute to enhanced access to justice for communities in Kenya.*

## **1.0 Introduction**

In Kenya, like in most other former African colonies, the legal system is pluralistic. The sources of law include the Constitutions, statutes, received laws, religious laws and customary laws.<sup>1</sup> Prior to colonialism, indigenous African tribes applied their laws and customs in resolving conflicts and disputes, and this contributed to social cohesion and peaceful coexistence. Because African customary law developed out of the customs and practices of the people in response to their circumstances and challenges in life, it essentially differs from one ethnic community to the other. The term ‘African customary law’ does not therefore infer that there exists a single custom followed by all African communities.<sup>2</sup>

With colonialism, formalized dispute resolution systems such as courts and tribunals were introduced in Kenya. As a result, the challenges of applicable law in a certain matter and the hierarchy of laws arose especially when dealing with Africans. The initial approach was to

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<sup>1</sup> M. Ndulo, *African Customary Law, Customs and Women’s Rights*, (Cornell Law Publications, 2011), p. 87.

<sup>2</sup> *Ibid.*

apply customary law on personal matters while there was confusion on criminal matters since in some cases both written law and African customs were applied. The general rule in most cases was that written and received law, in Kenya's case common law, doctrines of equity and statutes of general application, ranked higher than African Customary law. Colonialists regarded African customary law as inferior to written laws and therefore had to place limitations on its application.<sup>3</sup> Furthermore, after independence, statutes such the Judicature Act<sup>4</sup> and the Magistrate Courts Act<sup>5</sup> were enacted setting out the hierarchy of the laws and the purview of African customary law. These laws guided the courts when determining customary law claims until 2010 when the Constitution of Kenya 2010 was promulgated providing for wider avenues for the application of customary law. This paper discusses how Kenyan courts have interpreted customary law, the emerging jurisprudence and the jurisprudence that we expect from our courts in relation to the enhanced role and profile of customary law vis-à-vis traditional dispute resolution mechanisms.

The paper has seven parts. Part I is the introduction. Part II provides a brief overview of the court system since colonialism with a bias to African customary laws and formal courts. Part III highlights the dichotomy in jurisprudence between the formal and informal courts from colonialism up to independence. Part IV highlights the courts jurisprudence on African customary law from 1967 to 2010. Part V highlights the emerging jurisprudence after the promulgation of the 2010 Constitution. Part VI projects the direction jurisprudence on African customary law may take in the future taking into account new laws, past and emerging jurisprudence. Part VII concludes that despite the fact that emerging jurisprudence from our courts is supportive of customary law, past judicial decisions and judicial attitude may continue to influence courts thinking on customary law and therefore impede the application of traditional justice systems.

## **2.0 An Overview of the Judicial System since Colonialism**

Initially, the court system was pluralistic and depended on the race of the different inhabitants of Kenya then. Firstly, Article 52 of the 1897 Order-In-Council stated that African customary law applied to Africans provided it was not repugnant to justice and morality. Article 2(b) of the Native Courts Regulations Ordinance, 1897, recognized the use of existing dispute resolution systems, which at the time consisted of local chiefs and councils of elders. The local chiefs and councils of elders applied customary law in deciding disputes relating to their subjects. Secondly, Article 57 of the Native Courts Regulation Ordinance applied Islamic laws to Muslims. Muslim law was applied by Mudirs and from 1907 the Liwali courts. The Indians and Europeans were subject to statutes, common law and the courts.<sup>6</sup>

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<sup>3</sup> HWO, Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,' *University of Nairobi Law Journal Vol. 1 (2003)*, pp.107-117.

<sup>4</sup> Cap. 8, Laws of Kenya.

<sup>5</sup> Cap. 10, Laws of Kenya.

<sup>6</sup> M. Ndulo, *African Customary Law, Customs and Women's Rights, Op. Cit.*

In 1930, the colonial administration revised the court system relating to indigenous Africans with the lowest courts being a panel of elders from native law or area and whose decisions were appealed at the Native Appeals Tribunal, the District Commissioner and lastly to the Provincial Commissioner.<sup>7</sup> In 1951, the African Court replaced the Tribunal and the judicial powers of the Provincial Commissioner were transferred to the newly established Courts of Review.<sup>8</sup> In 1962, lay magistrates replaced the African Courts. In 1967, the Magistrates Courts Act<sup>9</sup> gave District Magistrates power to hear claims under African customary law. District Magistrates had jurisdiction all over Kenya and they effectively eliminated all African Courts. Appeals from the District Magistrate Courts went to First Class Magistrates, the High Court and then the East African Court of Appeal, which was replaced by the Court of Appeal after the collapse of the East African Community. According to Section 3(2) of the Judicature Act,<sup>10</sup> African customary law was to guide the Court of Appeal, the High Court and all subordinate courts in civil matters. In addition, the courts could only apply customary law if it was not repugnant to justice and morality. The use of customary law in courts was therefore meant to ensure there was substantive justice as encapsulated in section 3(2) of the Judicature Act.

Article 162 of the 2010 Constitution establishes a two-tier court system: Superior courts and subordinate courts. The Superior courts include the Supreme Court, the Court of Appeal, the High Court, Environment and Land Court, and Industrial Court. Subordinate courts include magistrate courts, Kadhi courts, and court martial. Article 159 (2)(c) and (3) entreats court to be guided by principles of traditional dispute resolution mechanisms provided the principles do not contradict the Bill of Rights, the Constitution, other written laws or result in outcomes that are repugnant to justice and morality.

### **3.0 Application of African Customary Law by Kenyan Courts from Colonial era up to 1967**

Since the British adopted existing legal systems, formal or informal, the law applied by the council of elders and the chiefs was the African customary law. Consequently, there was a dichotomy of courts. Informal institutions such as the council of elders, native tribunals and later African courts primarily resolved disputes among Africans. Disputes among Europeans were resolved in the formal courts, especially the supreme courts and it is only in limited instances when Africans were tried at the formal courts.<sup>11</sup>

On the one hand, the council of elders, African native tribunals, and later the African Courts applied customary laws. The jurisprudence from these tribunals, councils and courts show that they treated customary law with due regard as they applied the customs in both civil and criminal matters. Firstly, these courts applied to a distinct group of crimes, customary crimes and

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<sup>7</sup> R.L. Abel, 'Customary Law of Wrongs in Kenya: An Essay in Research Method,' *Yale Law School faculty Scholarship Series*, Paper 4013, (1969), p. 584.

<sup>8</sup> *Ibid.*

<sup>9</sup> Cap. 10, Laws of Kenya.

<sup>10</sup> Cap. 8, Laws of Kenya.

<sup>11</sup> R.L. Abel, 'Customary Law of Wrongs in Kenya: An Essay in Research Method,' *Op. Cit.*

wrongs, to their respective ethnic groups. For instance, among the Luo, it was a customary crime to abuse another or to take a woman from his marital home. For example, in *Maseno African Court Criminal Case 454 of 1966*, the plaintiff was able to sue the accused for wrongfully taking away a woman from her husband's custody without permission contrary to Luo customs. Similarly, in *Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango*,<sup>12</sup> the plaintiff sued the defendants for defamation under the Luo customs.

Secondly, these courts, councils and tribunals could punish for offences under statutes using African customary laws. In *Kosele African Court Criminal Case no 33 of 1966*, the accused was charged with indecent assault contrary to Section 144 of the Penal Code. The Court found that he was guilty for breaking the virginity of his victim. Instead of imprisoning him, the Court fined him a customary compensation of a heifer. Similarly, in *Bungoma District African Court Criminal Case No. 493 of 1967*, the accused was charged with common assault contrary to section 250 of the then Penal Code. The court found him guilty and imposed a customary fine of a sheep. Although section 176 of the current Penal Code provides for compensation, no method for determining the amount exists and this may explain why courts imposed customary compensation.

Lastly, formal courts appreciated the role of these councils, courts and tribunals in resolution of disputes of personal nature. In civil and personal matters, customary laws applied to Africans irrespective of the fact that some had become Christians and rejected African customs. For example, in *Benjawa Jembe v. Priscilla Nyondo*,<sup>13</sup> Barth J held that African Customary law was applicable to the estate of an African who had abandoned the customs and became a Christian.

On the other hand, formal courts in general and European judges in particular, treated African customary law and traditional dispute resolution systems as inferior to other laws. In 1917, just 5 years after the *Jembe* case, Hamilton C.J. was faced with the question of the recognition of customary marriages in *R v, Amkeyo*.<sup>14</sup> In this case, the question that arose during trial was whether a woman married under African customary law could testify against her husband. The common law deemed a husband and wife as one person and neither could be compelled to give evidence against the other. According to Hamilton C. J., a wife married under African customary law was not a legal wife or spouse. Consequently, the court compelled her to give evidence against her husband. This decision highlights the inferiority of African customary law in comparison to the Ordinances and common law that were in force at the time. From this decision, one cannot see a sound basis as to why a common law wife was regarded as a legal wife, while a customary law wife could not get a similar status. Why was there indifference towards African customary law considering that even common law was the English customary law?

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<sup>12</sup> Kisumu District Africa Court, CC 299/1966.

<sup>13</sup> [1912] 4 EALR 160.

<sup>14</sup> [1917] 7 EALR 14.

Moreover, European judges and formal courts treated African courts, tribunals and council of elders with opprobrium. In *Lolkilite ole Ndinoni v. Netwala ole Nebele*<sup>15</sup> the East African Court of Appeal dealt with two matters relating to the Maasai customary practice of blood money and the ability of Native Tribunals to apply the Limitation Ordinance of 1934. The appellant's father, who was deceased at the time of the case, had allegedly committed homicide and the matter was taken to the Native Tribunal. However, the claim for blood money was made at the native tribunal thirty-five years after the alleged homicide. The Tribunal dismissed the suit but the Supreme Court awarded the claim. The Appellant appealed to the East African Court of Appeal. The East African Court of appeal dismissed the claim on the ground that it was repugnant to justice and morality to bring a matter for hearing after 35 years. It is clear that the East African Court of Appeal considered claims for blood money valid but rejected bringing the matter after a long period. Despite the ruling that indirectly supported the claim for blood money, Sir Edward C.J. (Uganda) held that the Native Tribunals were not courts in the proper sense and therefore the Limitation Ordinance of 1934 was not applicable to them. The finding that the Native Tribunals were not proper courts, illustrates the Europeans attitude towards customary dispute resolution methods as inferior to formal courts.

#### **4.0 Court Application of Customary Laws from 1967 to 2010**

After independence, the legal system in Kenya changed. The 1967 Magistrate Courts Act converted the informal African Courts that heard matters relating to customary laws into formal Magistrate courts. Section 2 of the Act limited the customary claims under the law to matters of land, intestacy, family, seduction of unmarried women and girls, enticement of married women to adultery and status of women and children. This shift came through the 1963 Constitution that abolished unwritten customary crimes.<sup>16</sup> Likewise, section 3(2) of the Judicature Act limits the application of customary law by stating that it is only to guide courts in civil cases.

#### **4.1 Application of Customs to Civil and Personal Matters**

After 1967 courts reinforced the formal colonial courts perspective that customary law was inferior to other legal norms. Courts were only applying customary law as a guide in cases where written laws expressly provided for its usage. In *Kamanza s/o Chiwaya v. Manza w/o Tsuma*,<sup>17</sup> the High Court held that the list of claims under section 2 of the Magistrate Court Act was exhaustive and therefore barred customary law claims based on tort or contract. Claims based on tort and contracts were not included in section 2 of the Magistrates Court Act.

Most claims in which customary laws were used as a guide after 1967 fell within the ambit of section 3(2) of the Judicature Act and claims under section 2 of the Magistrates Court Act. Firstly, most claims related to probate and administration matters. For example, both in *Re*

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<sup>15</sup> [1952] 19 EACA.

<sup>16</sup> 1963 Kenya Order in Council, The constitution of Kenya Schedule 2, Sections 8(8), 8(16), implemented in 1966

<sup>17</sup> Unreported High Court Civil Appeal No. 6 of 1970.

*Ruenji*<sup>18</sup> and *Re Ogola Esates*<sup>19</sup> the respective testators drew wills that did not cater for their customary wives and the courts held that these wives were not wives for purposes of succession. However, the position of customary wives in succession was codified in section 3(5) of the Law of Succession Act.<sup>20</sup> According to Section 3(5) of the Law of Succession Act, a woman married to a man under a system that allows polygamy is a wife for succession purposes under Sections 26 and 40 of the Act despite the fact that the husband may have procured prior or subsequent monogamous marriage. Claims for succession brought after 1981 based on customary marriages such as polygamy have been successful due to the backing of section 3(5) of the Law of Succession Act. For example, in *Irene Njeri Macharia v. Margaret Wairimu Njomo and Anor*,<sup>21</sup> the Court of Appeal held that a wife married under customary law could claim through section 3(5) of the Law of Succession Act.

Secondly, courts have applied customary laws in burial disputes. However, the application has been due to lack of a legal framework that deals with the dead body. The Law of Succession Act deals only with the estate of the deceased and not the dead body itself. In some circumstances, a testator may express the manner in which the dead body is to be disposed, although the personal representative is not bound to adhere to his wishes. In *Pauline Ndete Kinyota Maingi v. Rael Kinyota Maingi*,<sup>22</sup> the Court dismissed the provisions of a will of the deceased, which stated the manner of disposal of his body and applied Kamba customary law. The Court held that the wishes in the will could only be given effect to where the executor proved that the customary laws were repugnant to justice and morality. Despite this position, courts still allow a deceased testator to be buried according to his expressed intentions, further limiting the role of customary law in burial disputes. For instance, in *Eunice Moraa Mabeche v. Grace Akinyi*,<sup>23</sup> the High court allowed the burial of the deceased in a Muslim cemetery according to his expressed wishes and rejected the deceased's mother attempt to have him buried in Kisii.<sup>24</sup>

Similarly, under common law, there is no property in a dead body. The use of customary law in burial disputes thus is only a last resort due to the absence of other laws dealing with the matter. This shows that customary law ranks the lowest in the hierarchy of legal norms, and courts only apply it where there is a legal lacuna. In *Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga*,<sup>25</sup> both the High Court and the Court of Appeal held that an African man could only be buried according to the customs of the community since he could not completely disassociate himself from the customs and practices of his tribe. The case involved a

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<sup>18</sup> [1977]KLR.

<sup>19</sup> [1978]KLR.

<sup>20</sup> Cap. 160, Laws of Kenya.

<sup>21</sup> CACA No. 139 of 1994.

<sup>22</sup> Civil Appeal No. 66 of 1984.

<sup>23</sup> High Court Civil Case No.2777 of 1994.

<sup>24</sup> See also: *Charles Onyango Oduke & Anor v. Samuel Onindo Wambi* [2010] eKLR and *James Apeli & Enoka Olasi v. Prisca Buluka*, Civil Appeal No. 12 of 1979.

<sup>25</sup> [1982-88]1 KAR.

dispute over the burial of S.M. Otieno's body after he died intestate. His wife wanted to bury him in his home at Ngong while his Umira Kager clansmen wanted to bury him at his ancestral home according to Luo customs. The High Court gave both parties the body and directed them to bury the deceased at his ancestral home. Some commentators have argued, (and the author concurs with them), that although the case was a triumph for African customary law, it failed to deal with the dichotomy between formal law and customary law but rather it reified this dichotomy. It is said the case was '*...a missed opportunity for the court to demonstrate the potential of customary law as a relevant and dynamic force in the face of changing social circumstances.*'<sup>26</sup>

#### **4.2 Courts and the Repugnancy Clause**

Courts have applied Section 3(2) of the Judicature Act to declare African customary law as being repugnant to justice and morality. One challenge with the application of the repugnancy clause is that Kenyan law does not define it. As such, judges have had wide discretion in determining what is repugnant to justice and morality. Invariably, the judges have largely borrowed laws from other states to determine what actions are repugnant to justice and morality without taking heed to Lord Denning's decision in *Nyali Limited v. Attorney-General*,<sup>27</sup> where he stated that common law may only be applied in foreign lands with modifications that fit local circumstances, since in foreign lands people have their own laws and customs that they respect.

Courts have held most customary practices to be repugnant to justice and morality both in criminal and civil matters. In *Katet Nchoe and Nalangu Sekut v. R*,<sup>28</sup> the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality. The courts disregarded the customs and practices of the Maasai and adopted the definition of repugnancy to justice and morality under the Ghanaian Constitution that defines a repugnant custom as one that is harmful to both the social and physical well-being of a citizen. The Court held that since female genital mutilation caused pain, it was repugnant to justice and morality based on the Ghanaian definition. The decision seems rational and well-informed but a further analysis makes it fall at the seams. The decision is unjust to uncircumcised Maasai women who are shunned by their male because of being uncircumcised. It does not answer the question whether the courts will compel Maasai men to marry their uncircumcised women. Further, it does not address the circumcision of males, which is also a customary practice that causes pain. This decision shows that courts apply the repugnancy clause out of context, and in essence subvert the said customs and practices as inferior to customs and practices from elsewhere.

In *Maria Gisege Angoi v. Macella Nyomenda*,<sup>29</sup> the court was faced with the question whether a woman-to-woman marriage custom among the Kisii was repugnant to justice and morality. A woman-to-woman marriage is a customary practice where a woman whose husband is dead "marries" another woman and chooses a male figure from her husband's clan to sire children for the dead husband. The High Court held that the practice was repugnant to justice and

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<sup>26</sup> W. Kamau, 'SM Otieno Revisited: A View through Legal Pluralist Lenses,' *Law Society of Kenya Journal Vol. 5(1) (2009)*, p. 73.

<sup>27</sup> [1955] 1 All ER 646.

<sup>28</sup> Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.

<sup>29</sup> Civil Appeal No. 1 of 1981.

morality since it prevented the other woman from freely choosing whom to marry. Thus, there was no marriage. The decision did not take into account the circumstances of the local communities and seems to interpret the repugnancy and morality of customs in a limiting manner.

### 4.3 Proof of Customary Laws in Evidence

The fact that customary law has to be proved in court illustrates the low place it occupies in the juridical order. The Court of Appeal of Kenya has followed the Ghanaian case of *Angu v. Attah*<sup>30</sup> in *Atemo v. Imujaro*<sup>31</sup> that customary law has to be evidentially proved in court for it to be regarded as law. Similarly, in *Ernest Kinyajui Kimani v. Muiru Gikanga and Another*<sup>32</sup>, the court held that where customary law was not notorious or written; the party relying on it must prove it in court. Compared to the Constitution, statutes, common law and equity, which the courts take judicial notice of, customary law has to be proved.

The main reason why common law and equity are not proved in courts is that the courts assume they have attained public notoriety. Courts simply take judicial notice of these laws despite the fact that they are unwritten. The public notoriety principle seems valid. Nonetheless, customary laws cannot attain public notoriety in the same way since most are rejected for being repugnant to justice and morality. Additionally, formal judges are taught the common law and principles of equity in their formal training and not customary law. Furthermore, customary law is specific to particular ethnic communities. African customary law is also not taught and when covered it is glanced at furtively to prove their repugnancy to morality and justice. This ensures that most African customary laws do not gain public notoriety to enable their frequent use in resolution of disputes.

However, in cases where customary laws have become notorious, courts have taken judicial notice of those customs. In *Wambugi w/o Gatimu v. Stephen Nyaga Kimani*,<sup>33</sup> the Kenyan Court of Appeal denied a married woman from inheriting her father's land on the ground that the Kikuyu custom that a married woman does not inherit her father's land was notorious and thus the court took judicial notice of that custom. It seems that the basis of this decision is grounded in Section 60 (1) (a) read together with section 60(1)(o) of the Evidence Act which give courts discretion to take judicial notice of all written and unwritten laws having the force of law in Kenya, and practices that have gained notoriety.

The proof of customary laws has been through assessors in both civil and criminal matters. Section 87(1) of the Civil Procedure Act<sup>34</sup> empowers the courts to use assessors in cases of disputes as to what the customs or laws of a caste, tribe, or community are. Likewise, up to 2007, sections 263, 269, 270, 271, 272, 297, 298, 299 and 322 of the Criminal Procedure Code<sup>35</sup>

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<sup>30</sup> [1916] PC 1874-1928.

<sup>31</sup> [2003]KLR 435.

<sup>32</sup> [1965] EA 735.

<sup>33</sup> [1992] 2 KAR 292.

<sup>34</sup> Cap. 21, Laws of Kenya.

<sup>35</sup> Cap. 75, Laws of Kenya.



provided for the use of assessors in trials at the High Court. These assessors helped the courts in resolving or settling disputes where customary laws are pleaded in criminal cases among other disputes. The institution of assessors in courts was a continuation from the colonial courts. In *R v. Mohammed Iddi Omar*,<sup>36</sup> Ouko J explained the institution of assessors as that formed in colonial days to enable the European judges to understand the customs of local tribes when resolving cases and thus ensure that justice was contextualized to indigenous people.

Although the institution of assessors was meant to administer justice in local context, laws and judicial opinions have continued to subjugate customary law. Under the provisions of the Criminal procedure code cited above paragraph, the judge was not bound to adhere by the opinion of assessors and they could dissent from the opinions with reasons. The existence of grounds such as repugnancy and justice, substantial justice, limitation to civil cases and subjection to other written laws provided fertile grounds for rejection of customary law. Ouko J, in the *Mohammed Iddi Omar case* summed the position of assessors as useless since most judges could overrule their opinions. The inferiority of the customs, laws and institutions of assessors stems from the colonial period when European Judges treated them as inferior and repugnant. For instance, Thacker J in *R v. Ogende s/o Omungi*<sup>37</sup> stated that he deplored the opinions of assessors because they were based on intertribal prejudice and resulted from pervasiveness and stupidity.

## **5.0 Emerging Jurisprudence from our Courts post-2010**

Kenya promulgated a new constitution in 2010. Article 159 (2) (c) of the Constitution provides that courts are to be guided by the principles of traditional dispute resolution mechanisms. Article 159(3) limits the application of traditional dispute resolution mechanisms by stating that they should not be used in a manner that contravenes the Bill of Rights, is inconsistent with the Constitution or other written laws or is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality.

Court decisions coming after the promulgation of the Constitution have applied customary law principles and traditional dispute resolution mechanisms in criminal law. Firstly, the oft-cited case of *R v. Mohamed Abdow Mohamed*<sup>38</sup> applied traditional dispute resolution mechanism in resolving a murder case. Abdow Mohamed was charged together with others not before the court for the murder of Osman Ali Abdi on 19 October 2011 in Eastleigh, within the Starehe District of Nairobi. On the date of the trial, the prosecution made an application to court to mark the matter settled based on Islamic laws and customs. The prosecution claimed that the accused's family had paid compensation to the deceased family in form of camels, goats, and performed rituals. The rituals were a form of blood money to the deceased's family. Further, the prosecution claimed that witnesses to the murder were not willing to testify and therefore they could not be able to proceed with the case. The court upheld the application of the traditional

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<sup>36</sup> [2006]eKLR.

<sup>37</sup> [1941] 19 KLR 25.

<sup>38</sup> [2013]eKLR.

dispute resolution system based on Article 159 and Article 157 that allowed the Director of Public prosecution to withdraw cases with the leave of the court. This decision depicts the widening scope of TDRMs into the arena of criminal law, a position rarely held by courts in pre-2010 jurisprudence on customary law.

Secondly, apart from diverting cases from the criminal justice system by use of traditional dispute resolution mechanisms, an emerging jurisprudence from the court entails awarding compensation for offences based on customary law. Promoting traditional justice resolution mechanism would imply that courts adopt the decisions made by traditional dispute systems while in customary compensation; the court itself applies the customs of a community, clan or tribe in punishing those found guilty under the criminal justice system. Customary compensation may be based on section 176 of the Criminal Procedure Code that allows for compensation of victims, although customary laws are not expressly provided for in the text of the Code.

In *R v. Lenaas Lenchura*<sup>39</sup> Emukule J sentenced Lenaas Lenchura using customary laws on conviction of manslaughter. Lenchura, a World War II veteran, stabbed the deceased, Lotiyan Lekapana, at a Lerata trading center after a dispute arose between the two on who would fetch water first. The deceased was 55 years while the accused was 89 years at the time of the fight and stabbing. After a plea bargain, the accused charge of murder was reduced to manslaughter and he pleaded guilty. As such, the only question that remained was on sentencing. The prosecution argued that the court should take into account the fact that the accused was a first offender and the circumstances under which he killed the deceased. The accused counsel submitted that water was a scarce resource in Samburu, a resource that carried the importance of life and death, and that the court should consider this. Due to the accused's advanced age and the inability of the government to provide water, a duty imposed on it by the Constitution, Emukule J resorted to the customary laws of the accused. He sentenced the accused to five years suspended sentence and required him to pay compensation of one female camel to the family of the deceased according to their customs.

## **6.0 Expected Jurisprudence to enhance Access to Justice using TDRMs**

Traditional dispute resolution mechanisms (TDRM) entail the use of practices and customs of a community in resolving disputes. They form part of the cultural norms, values and traditions of a particular community. Thus, traditional disputes resolution mechanisms are firmly embedded on the customary laws of a tribe or ethnic group. Consequently, the success of TDRM in enhancing access to justice is pegged on the role and recognition of customary laws as a significant source of law.<sup>40</sup>

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<sup>39</sup> Criminal Case No. 19 of 2011.

<sup>40</sup> F. 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 Journal Vol.2 Issue 1* (2014), available at <http://www.ciarbkenya.org/International%20Conference%20Journal%202014.pdf>, accessed on 28/09/2014.

Judicial decisions since the promulgation of the Constitution in 2010 have shown increased recognition of customary laws and TDRMs. The basis for the wide application of customary laws and TDRMs include Articles 2(4), 10, 11, 48, 67(2) (f), 159 (2) (c) and 159(3). Article 2(4) of the Constitution recognizes customary law as one of the applicable sources of law in Kenya. Under this provision customary law is required to be consistent with the Constitution only and not statute law. Article 10 (2) (b) outlines the national values and principles of governance that are to guide courts in interpreting the constitution or any law. These values and principles include inclusiveness, public participation, social justice, human rights and protection of the marginalized. Traditional justice systems can be promoted by courts to attain these values and principles. Courts are further enjoined to respect, uphold and defend the Constitution in Article 3(1). Article 48 mandates the state to promote access to justice for all people. In addition, Article 259 (1) (a) and (c) requires the Constitution to be interpreted in a manner that is purposive and leads to the development of the law. Courts are therefore enjoined to promote and encourage the use of traditional justice mechanisms to enhance access to justice and in recognition of the culture and cultural expressions of the people. This is because in some parts of Kenya, there are no formal courts and TDRMs are the only means to access justice. Thus, the future jurisprudence will likely take into account the principles of TDRMs.

Unlike Section 3(2) of the Judicature Act and Section 2 of the Magistrate Courts Act, Article 159 of the Constitution does not limit the application of TDRM principles to civil matters only.<sup>41</sup> The courts have interpreted the Article widely to include application of TDRMs in criminal cases as was in *R v. Mohamed Abdow Mohamed*. This approach is reminiscent of the pre-1967 jurisprudence when the native tribunals and African Courts adjudicated upon customary crimes and wrongs. The emerging jurisprudence shows that TDRMs could be used in conjunction with the criminal code and the courts could encourage the use of traditional justice systems especially in cases where restorative justice and peace is what is of great concern to communities as opposed to retributive justice. However, it is highly unlikely that the prosecution will charge individuals with unwritten customary law, as was the position before 1967. Moreover, emerging judicial decisions show that unlike the period between 1967 and 2010 when customary laws were not applicable in criminal law, TDRMs after 2010 are amenable to criminal law.

In land matters, Article 63 already designates community land to be land that is held on the basis of community of interests, ethnicity or culture. Article 67 (2) (f) of the Constitution requires the National Land Commission to encourage use of traditional dispute resolution in land disputes and conflicts. In addition to the Constitution and customary laws, other statutory frameworks enacted under the Constitution 2010 also provide for resolution of disputes through reconciliation and TDRMs. Section 18 (c) of the Environment and Land Court Act also entreats the court to apply the principles under Article 159 (2) of the Constitution in resolving disputes.

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<sup>41</sup> F. Kariuki, 'Redefining Arbitrability: Assessment of Articles 159 & 189(4) of the Constitution of Kenya,' *Alternative Dispute Resolution Journal Vol.1 Issue 1* (2013), ISBN 9789966-046024, pp. 174-188.

Similarly, Section 68 of the Marriage Act 2014 provides that parties married under customary laws may be required by a court to go through customary dispute resolution mechanisms in matters concerning dissolution of marriages before filing for divorce. In *Lubaru M'Imanyara v. Daniel Murungi*<sup>42</sup> and *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others*<sup>43</sup> the courts referred land marital disputes to Njuri Cheke for resolution based on Article 259(2) (c) of the Constitution.

Similarly, Section 176 of the Criminal Procedure Code provide for the use of compensation and reconciliation for settlement of crimes affecting the person such as assault provided they do not fall into the category of felonies. Inasmuch as Emukule J did not refer to Section 176 of the Criminal Procedure Code, the decision in *R v. Lenaas Lenchura* seems to fall under this category. The best basis for compensation is not in monetary terms but on customary practices of the affected persons. Application of customary compensation in criminal law under written laws revert to the pre-1967 period where customary compensation was widely used in lieu of sentencing for crimes under the Penal Code and other statutes.

Despite the enhanced role of customary law and TDRMs under the Constitution, Statutes to be enacted<sup>44</sup> and judicial opinions post-2010, history of the courts application of customary law may be an impediment to achieving justice under TDRMs. An analysis of Sections 3(2) of the Judicature Act and Article 159(2) (c) and (3) reveals striking similarities that courts may cling onto to deny TDRM oxygen to survive. In the Judicature Act, customary law is only used as a guide while in the Constitution; the courts are to be guided by TDRM principles. Both laws do not require courts to apply customary laws or TDRMs but only entreats them to use them as a guide. The implication is that courts may refuse to apply either even in appropriate cases since they are only a guide. Consequently, the judicial officers hearing a certain matter have absolute discretion on their applications within the formal justice system. However, the Constitution seems to clarify on the juridical place of customary law by recognizing it. This may contribute to greater recognition and promotion of traditional justice systems by courts in enhancing access to justice.

Nonetheless, Article 159 (3) (c) retains the hierarchical inferiority existing prior to 2010 by introducing the repugnancy clause issue in relation to traditional justice mechanisms. By implication, traditional justice systems and customary law is still inferior to common law and principles of equity which the courts takes judicial notice of under Section 60 of the Evidence Act while customary law has to be proved in court. Additionally, Section 3 of the Judicature Act also ranks common law and principles of equity above customary laws and in effect TDRMs. The only time customary laws rank over common law is when they have been codified into statutes for instance polygamy under Section 3(5) of the Law of Succession Act. A challenge then arises due to the unwritten and un-codified nature of customary law. Inadequate codification

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<sup>42</sup> [2013] eKLR.

<sup>43</sup> [2012] eKLR.

<sup>44</sup> For example, if they disallow or further limit the application of traditional justice systems in a manner inconsistent with Article 159(3) of the Constitution.

of customary law principles into statutes ensures that customary laws and TDRMs remain at the bottom of the legal totem pole.

Thirdly, Article 159 (3) (b) of the Constitution bars the application of TDRMs when they are repugnant to justice and morality. The Constitution or statutes provide neither a definition nor what justice and morality entail. Further, courts have not interpreted justice and morality within the context of the challenged customs and TDRMs. Therefore, a judicial officer has leeway to determine what justice and morality is. More often than not, judicial officers use their own models of justice and morality or borrow from other areas and use them as standards to evaluate customary laws or TDRMs. The position ignores that different tribes, communities and ethnic groups have different customs. Using another custom to evaluate the justice and morality of an unrelated custom amounts to subjugation.

## **7.0 Conclusion**

In conclusion, jurisprudence from the courts before 2010 show that they have treated African customary law as inferior to statutory laws in the juridical order of legal norms. The inferiority has emanated from colonial laws such as Section 3(2) of the Judicature Act and Section 2 of the Magistrate Courts Act that limits the list of claims under customary laws. The repugnancy clause has formed the basis for the disqualification and treatment of customary law as inferior. Additionally, the inferiority has been buttressed by the fact that customary law is uncodified source of law and therefore must be proved in court. This jurisprudential history if unchecked may act as an impediment to the application of TDRMs and Articles 159(2) (c) and (3) of the Constitution since TDRMs and customary laws are closely interlinked and interconnected. There is therefore a need for a change of mindset and perceptions amongst judges, lawyers and the wider citizenry towards customary law if traditional justice systems are to contribute to enhanced access to justice for communities in Kenya. Courts must develop and generate appropriate and relevant customary law jurisprudence that will aid in the growth and promotion of traditional justice systems.