

*Promoting Justice and Reconciliation through Mediation and Alternative Justice Systems*

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**Kariuki Muigua**

**Table of Contents**

Abstract..... 3

1.0 Introduction ..... 3

2.0 Overview of Mediation and Alternative Justice Systems ..... 5

3.0 Efficacy of Mediation and Alternative Justice Systems in Promoting Justice and Reconciliation ..... 9

4.0 Conclusion ..... 13

References ..... 16

## **Promoting Justice and Reconciliation through Mediation and Alternative Justice Systems**

**Kariuki Muigua\***

### **Abstract**

*This paper critically discusses the role of mediation and Alternative Justice Systems (AJS) in promoting justice and reconciliation. The paper argues that mediation and AJS are suitable processes in fostering justice and reconciliation. The paper critically explores the key features of mediation and AJS that make these mechanisms ideal in achieving justice and reconciliation. It also assesses the progress made towards embracing mediation and AJS towards justice and reconciliation and notes the challenges thereof. The paper offers proposals towards promoting justice and reconciliation through mediation and AJS.*

### **1.0 Introduction**

Conflicts are a common and inevitable occurrence in human relationships and interactions<sup>1</sup>. Conflicts often arise in instances where two or more parties perceive that they possess mutually incompatible goals<sup>2</sup>. According to the United Nations, conflicts arise when two or more groups believe their interests are incompatible<sup>3</sup>. It has been noted that conflicts are an inevitable part of living since they are related to situations of scarce resources, division of functions, power relations and role-differentiation<sup>4</sup>.

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<sup>1</sup> Muigua, K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-EastAfricanCommunityMoving-from-Alternative-to-Appropriate-Dispute-Resolution> (Accessed on 11/09/2024)

<sup>2</sup> Demmers, J., 'Theories of Violent Conflict: An Introduction' (Routledge, New York, 2012)

<sup>3</sup> United Nations., 'Land and Conflict' Available at [https://www.un.org/en/land-natural-resources-conflict/pdfs/GN\\_ExeS\\_Land%20and%20Conflict.pdf](https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_ExeS_Land%20and%20Conflict.pdf) (Accessed on 11/09/2024)

<sup>4</sup> Bercovitch, J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at

Some forms of conflict such as violent conflicts are undesirable since they affect peace, sustainability and development<sup>5</sup>. However, conflict is not in itself a negative phenomenon<sup>6</sup>. For example, non-violent conflict can be an essential component of social change and development, and is a necessary component of human interaction<sup>7</sup>. It has been noted that non-violent resolution of conflict is possible when individuals and groups have trust in their governing structures, society and institutions to manage incompatible interests<sup>8</sup>. Effective, efficient and expeditious management of conflicts is a key goal towards promoting peace, development and sustainability<sup>9</sup>.

Justice and reconciliation are two vital objectives in conflict management<sup>10</sup>. It has been noted that the concepts of justice and reconciliation are related to the building of trust in the context of inclusive peace building especially after violent conflicts<sup>11</sup>. Both justice and reconciliation seek to address the legacies of violence and human rights abuses to compensate for past wrongs and promote social healing towards peace, sustainability, and development<sup>12</sup>. Justice in the legal sense entails a structure or system that guides the allocation of benefits or burdens when the law is applied to particular factual circumstances<sup>13</sup>. Justice can be divided into *distributive justice* which involves fair division

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<https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf> (Accessed on 11/09/2024)

<sup>5</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>6</sup> United Nations., 'Land and Conflict' Op Cit

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Muigua. K & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-anddevelopmentinKenyaRevised-version-of-20.10.14.pdf> (Accessed on 11/09/2024)

<sup>10</sup> Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Available at <https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf> (Accessed on 11/09/2024)

<sup>11</sup> SIDA., 'Transitional Justice and Reconciliation' Available at <https://cdn.sida.se/app/uploads/2020/12/01125338/transitional-justice-and-reconciliation.pdf> (Accessed on 11/09/2024)

<sup>12</sup> Ibid

<sup>13</sup> Justice., Available at <https://www.law.cornell.edu/wex/justice> (Accessed on 11/09/2024)

of resources in the society; retributive justice which focuses on punishing crimes in a society; *restorative justice* that focuses on trying to repair the harm that has caused by criminal activities by involving those who have been affected; and *procedural justice* that focuses on making and implementing decisions according to fair processes that ensure fair treatment of every person<sup>14</sup>. Reconciliation on the other hand refers to the process of building or rebuilding relationships damaged by violent conflict, between individuals or groups within the society, or between the population and the state/institutions<sup>15</sup>. Reconciliation is a concept of justice since it focuses on restoring right relationship following wrongs<sup>16</sup>.

This paper critically discusses the role of mediation and Alternative Justice Systems (AJS) in promoting justice and reconciliation. The paper argues that mediation and AJS are suitable processes in fostering justice and reconciliation. The paper critically explores the key features of mediation and AJS that make these mechanisms ideal in achieving justice and reconciliation. It also assesses the progress made towards embracing mediation and AJS towards justice and reconciliation and notes the challenges thereof. The paper offers proposals towards promoting justice and reconciliation through mediation and AJS.

## **2.0 Overview of Mediation and Alternative Justice Systems**

Mediation refers to a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements<sup>17</sup>. It has also been defined as a non-adversarial and collaborative process through which an impartial third party helps parties in a dispute reach a

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<sup>14</sup> Maiese. M., & Burgess. H., 'Types of Justice' Available at [https://www.beyondintractability.org/essay/types\\_of\\_justice](https://www.beyondintractability.org/essay/types_of_justice) (Accessed on 11/09/2024)

<sup>15</sup> SIDA., 'Transitional Justice and Reconciliation' Op Cit

<sup>16</sup> Philpott, Daniel, 'Reconciliation as a Concept of Justice', *Just and Unjust Peace: An Ethic of Political Reconciliation*, Studies in Strategic Peacebuilding (New York, 2012; online edn, Oxford Academic, 20 Sept. 2012), <https://doi.org/10.1093/acprof:oso/9780199827565.003.0005> (Accessed on 11/09/2024)

<sup>17</sup> United Nations., 'Basics of Mediation: Concepts and Definitions.' Available at <https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf> (Accessed on 12/09/2024)

resolution through interest-based negotiations<sup>18</sup>. Mediation can also be understood as a process of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussions and the flow of information therefore aiding parties in the process of reaching an agreement<sup>19</sup>. The basis of mediation is that in the right environment, parties to a conflict can improve their relationships and move towards cooperation<sup>20</sup>. It has been noted that mediation outcomes can be limited in scope, dealing with a specific issue in order to contain or manage a conflict, or can tackle a broad range of issues in a comprehensive peace agreement<sup>21</sup>.

Mediation arises where the parties to a conflict have attempted negotiations, but have reached a deadlock<sup>22</sup>. Parties therefore agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock<sup>23</sup>. Mediation is therefore usually a continuation of the negotiation process. In the mediation process, a mediator does not have the power to impose an outcome upon the parties but rather facilitates communication, promotes understanding, focuses the parties on their interests, and uses creative problem solving to enable the parties to reach their own mutually satisfactory agreement<sup>24</sup>.

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<sup>18</sup> United Nations Environment Programme., 'Natural Resources and Conflict: A Guide for Mediation Practitioners' Available at [https://peacemaker.un.org/sites/peacemaker.un.org/files/NRCMediation\\_UNDPAUNEP2015\\_0.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/NRCMediation_UNDPAUNEP2015_0.pdf) (Accessed on 12/09/2024)

<sup>19</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2<sup>nd</sup> Edition., 2017

<sup>20</sup> United Nations., 'Guidance for Effective Mediation' Available at <https://peacemaker.un.org/sites/default/files/document/files/2022/09/guidanceeffectivemediationundpa2012english0.pdf> (Accessed on 12/09/2024)

<sup>21</sup> Ibid

<sup>22</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

<sup>23</sup> Ibid

<sup>24</sup> Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

The *Charter of the United Nations*<sup>25</sup> identifies mediation as an important means for the peaceful settlement of disputes and conflicts<sup>26</sup>. At a national level, the *Constitution of Kenya*<sup>27</sup> urges courts and tribunals to promote mediation among other Alternative Dispute Resolution processes<sup>28</sup>. According to the United Nations, mediation has proven to be an effective instrument in addressing both inter-State and intra-State conflicts<sup>29</sup>.

AJS has been defined as both a philosophical concept as well as a practice for accessing justice<sup>30</sup>. As a philosophical concept, AJS is consistent with the human rights school of thought, and is based on the fundamental ideas of freedom, equality, non-discrimination, dignity, and equity<sup>31</sup>. Further, as a practice for accessing justice, AJS refers to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity<sup>32</sup>. It has been noted that the term AJS covers various techniques including Customary and Informal Justice Systems (CIJ) and Traditional Dispute Resolution Mechanisms (TDRMs)<sup>33</sup>. These phrases cover dispute resolution practices that are often embraced by indigenous communities in managing conflicts through institutions such as community paralegals, local authorities, and elders<sup>34</sup>.

AJS have been practiced in Kenya and Africa at large for many centuries<sup>35</sup>. It has been pointed out that in Kenya, the different communities that existed before colonial occupation and rule had their own systems and mechanisms of promoting justice<sup>36</sup>. These

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<sup>25</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

<sup>26</sup> Ibid, article 33 (1)

<sup>27</sup> Constitution of Kenya., 2010., Government Printer, Nairobi

<sup>28</sup> Ibid, article 159 (2) (c)

<sup>29</sup> United Nations., 'Guidance for Effective Mediation' Op Cit

<sup>30</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> (Accessed on 12/09/2024)

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Op Cit

<sup>34</sup> Ibid

<sup>35</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

<sup>36</sup> Ibid

systems are referred to as Customary or Traditional systems<sup>37</sup>. For many years, customary and informal justice mechanisms were at the center of conflict management as communities thrived and its constituents expressed satisfaction at how justice was dispensed<sup>38</sup>. However, AJS have to a certain extent been altered through the encounter with the colonial and post-colonial legal systems<sup>39</sup>. During the colonial era, AJS were considered retrogressive, archaic and outdated with the colonial powers introducing their own justice systems that were favourable to white settlers and punitive to indigenous communities<sup>40</sup>.

The Constitution of Kenya provides a basis for recognition and promotion of AJS by mandating courts and tribunals to promote TDRMs<sup>41</sup>. It has been noted that the Constitution does not establish AJS, but only recognises their existence and provides the basis for their promotion<sup>42</sup>. The Constitutional recognition of AJS is a key measure towards restoring customary law and culture to a place of prominence<sup>43</sup>.

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<sup>37</sup> Ibid

<sup>38</sup> The International Commission of Jurists., 'Alternative Justice System Solution To Backlog Of Cases' Available at <https://icj-kenya.org/news/alternative-justice-system-solution-to-backlog-of-cases/> (Accessed on 12/09/2024)

<sup>39</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

<sup>40</sup> The International Commission of Jurists., 'Alternative Justice System Solution To Backlog Of Cases' Op Cit

<sup>41</sup> Constitution of Kenya, 2010., article 159 (2) (c)

<sup>42</sup> Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines' Available at <https://www.trocaire.org/wp-content/uploads/2021/04/Alternative-Justice-Systems-regulations-final.pdf?type=policy> (Accessed on 12/09/2024)

<sup>43</sup> Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Op Cit



### **3.0 Efficacy of Mediation and Alternative Justice Systems in Promoting Justice and Reconciliation**

Mediation is an ideal process that can promote justice and reconciliation<sup>44</sup>. Mediation has certain advantages that makes it ideal in promoting justice and reconciliation including informality, expeditiousness, cost-effectiveness, flexibility, efficiency, and confidentiality<sup>45</sup>. In addition, mediation usually results in mutually satisfying and long-lasting outcomes therefore creating a suitable environment for peace and reconciliation by eliminating the likelihood of conflicts reemerging in future<sup>46</sup>. Mediation also has the potential to preserve and at times even enhance relationships therefore making it an ideal mechanism in achieving justice and reconciliation<sup>47</sup>. It further allows parties to come up with creative solutions than those available in traditional litigation<sup>48</sup>.

Mediation can enhance justice and reconciliation due to its potential to unlock collaboration in managing conflicts<sup>49</sup>. Collaboration is a key approach towards managing conflicts wherein parties work together to reach an agreement over issues in dispute<sup>50</sup>. It has been identified as a powerful approach to conflict resolution built on cooperation, open communication, and finding win-win outcomes<sup>51</sup>. Collaboration aims to preserve relationships, build trust, and promote long-term positive change<sup>52</sup>. Mediation provides a pathway to unlock collaboration and transform conflicts into opportunities for growth

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<sup>44</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> World Intellectual Property Organization., 'What is Mediation?' Available at <https://www.wipo.int/amc/en/mediation/what-meditation.html> (Accessed on 13/09/2024)

<sup>48</sup> JAMS ADR., 'What is ADR? Defining the Alternative Dispute Resolution Spectrum' Available at <https://www.jamsadr.com/adr-spectrum/> (Accessed on 13/09/2024)

<sup>49</sup> Unlocking Collaboration: The Power of Mediation., Available at <https://www.linkedin.com/pulse/unlocking-collaboration-power-meditation-jharna-jagtiani-g7kxc/> (Accessed on 13/09/2024)

<sup>50</sup> Food and Agriculture Organization., 'Collaborative Conflict Management for Enhanced National Forest Programmes (NFPs)' Available at <https://www.fao.org/3/i2604e/i2604e00.pdf> (Accessed on 13/09/2024)

<sup>51</sup> Miroslavov. M., 'Mastering the Collaborating Conflict Style In 2024' Available at <https://www.officernd.com/blog/collaboratingconflictstyle/#:~:text=It's%20one%20of%20the%20strategies,their%20underlying%20needs%20and%20interests> (Accessed on 13/09/2024)

<sup>52</sup> Ibid

and understanding<sup>53</sup>. By enhancing collaboration, mediation emphasizes on voluntary participation of the parties, confidentiality, and the flexibility to tailor the outcomes to the specific needs of the parties involved<sup>54</sup>.

Due to the foregoing advantages, mediation is ideal in promoting justice and reconciliation. The informality, flexibility, and cost-effectiveness of mediation makes it suitable in enhancing access to justice especially for the poor and marginalized individuals and groups<sup>55</sup>. Through mediation, conflicts can be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system<sup>56</sup>. It has been noted that mediation can bring justice closer to the people and make it more affordable<sup>57</sup>. Further, mediation has the potential to foster reconciliation by addressing the root causes of conflicts therefore leading to long lasting and sustainable outcomes and preventing the likelihood of conflicts reemerging in future<sup>58</sup>. Mediation can also preserve and at times even enhance relationships therefore making it an ideal mechanism in promoting reconciliation<sup>59</sup>. It has been noted that mediation relies heavily on principles of reconciliation to achieve long-lasting and meaningful outcomes<sup>60</sup>. By fostering understanding, empathy, and communication, mediation can ultimately result in reconciliation between parties<sup>61</sup>. It is therefore necessary to harness the potential of mediation in order to promote justice and reconciliation.

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<sup>53</sup> Unlocking Collaboration: The Power of Mediation., Op Cit

<sup>54</sup> Mediation: The Art of Collaborative Conflict Resolution., Available at <https://legalservicesdubai.com/mediation-the-art-of-collaborative-conflict-resolution-understanding-its-processes-and-advantages/> (Accessed on 13/09/2024)

<sup>55</sup> Muigua. K., 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Reflections-on-the-Use-of-Mediation-for-Access-to-Justice-in-Kenya-Maximising-on-the-Benefits-of-Mediation-Kariuki-Muigua-14th-June-2018-1.pdf> (Accessed on 13/09/2024)

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

<sup>59</sup> World Intellectual Property Organization., 'What is Mediation?' Op Cit

<sup>60</sup> Dallago. D., 'How Reconciliation in Mediation Can Transform Conflict into Sustainable Harmony' Available at <https://imamediation.com/blog/how-reconciliation-in-mediation-can-transform-conflict-into-sustainable-harmony> (Accessed on 13/09/2024)

<sup>61</sup> Ibid

AJS are also ideal in promoting justice and reconciliation<sup>62</sup>. In Kenya and Africa at large, AJS are deeply rooted in the culture and customs of the African people<sup>63</sup>. Culture plays a prominent role in conflict management<sup>64</sup>. Culture has been described as essential part of conflict and conflict resolution<sup>65</sup>. It affects the ways we name, frame, blame, and attempt to tame conflicts<sup>66</sup>. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture<sup>67</sup>. Culture therefore plays an important role in conflict management and shapes the way in which individuals or groups frame and respond to conflicts<sup>68</sup>.

Conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people<sup>69</sup>. Conflicts in African communities were seen as threat to the social fabric that held the community together<sup>70</sup>. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community<sup>71</sup>. Conflict management among African communities was aimed at creating

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<sup>62</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

<sup>63</sup> Ibid

<sup>64</sup> LeBaron. M., 'Culture and Conflict.' Available at [https://www.beyondintractability.org/essay/culture\\_conflict](https://www.beyondintractability.org/essay/culture_conflict) (Accessed on 13/09/2024)

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579-603

<sup>68</sup> LeBaron. M., 'Culture and Conflict.' Op Cit

<sup>69</sup> Ademowo. A., 'Conflict Management in Traditional African Society.' Available at [https://www.researchgate.net/publication/281749510\\_Conflict\\_management\\_in\\_Traditional\\_African\\_Society](https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society) (Accessed on 13/09/2024)

<sup>70</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elderssuccesseschallenges-and-opportunities-1.pdf> (Accessed on 13/09/2024)

<sup>71</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs<sup>72</sup>.

AJS are therefore able to promote justice and reconciliation. These techniques fit comfortably within traditional concepts of African justice, particularly its core value of reconciliation<sup>73</sup>. In addition, informal justice systems, such as customary and traditional dispute resolution mechanisms, are often more accessible and affordable than formal justice systems therefore making them an appropriate tool in enhancing access to justice<sup>74</sup>. Since most AJS processes are closely tied to the communities and are mostly non-institutionalized, these processes are cost-effective and more affordable when compared to formal systems<sup>75</sup>.

In addition, the focus of AJS goes beyond resolution of disputes<sup>76</sup>. AJS also focus on dispute prevention and ensuring minimal or non-recurrence of disputes<sup>77</sup>. It has been noted that AJS include mechanisms that deal both with resolving legal disputes as well as those seeking everyday justice<sup>78</sup>. This expansion moves AJS beyond the narrow conception of Alternative Dispute Resolution (ADR) that only captures mechanisms designed towards resolution of disputes<sup>79</sup>. AJS are therefore suitable in promoting justice and reconciliation.

Despite their ability to promote justice and reconciliation, the efficacy of mediation and AJS may be limited by certain factors. For example, it has been noted that power is a

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<sup>72</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

<sup>73</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

<sup>74</sup> Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS)' Available at <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/> (Accessed on 13/09/2024)

<sup>75</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

<sup>76</sup> Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines' Op Cit

<sup>77</sup> Ibid

<sup>78</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

<sup>79</sup> Ibid

major concern in mediation<sup>80</sup>. Where there is a significant power difference, one party may dominate the process and the resulting outcome may largely reflect only that party's needs and interests therefore not promoting justice and reconciliation<sup>81</sup>. In addition, the non-binding nature of mediation may affect the continuation of mediation proceedings and the enforcement of outcomes thus limiting its suitability in promoting justice and reconciliation<sup>82</sup>. On the other hand, AJS often reflect patriarchal values and discriminate against women, children, and other marginalized groups<sup>83</sup>. Therefore, a key concern in utilizing AJS is the potential for violation of human rights, particularly those of women and marginalized groups<sup>84</sup>. For example, it has been noted that in some communities, women are not permitted to speak or even be present during proceedings, even if they are the victim, and must rely on male relatives to plead their case<sup>85</sup>. In addition, there are concerns about procedural fairness in AJS and the ability to adhere to constitutional thresholds of access to justice<sup>86</sup>.

It is imperative to address these challenges in order to promote justice and reconciliation through mediation and AJS.

#### **4.0 Conclusion**

There is need to promote justice and reconciliation through mediation and AJS. Mediation is suitable in promoting justice and reconciliation due to its key features including informality, expeditiousness, cost-effectiveness, flexibility, efficiency, and confidentiality<sup>87</sup>. Further, by focusing on collaboration, mediation is able to preserve and even enhance relationships therefore promoting justice and reconciliation<sup>88</sup>. AJS are rooted in the culture and customs of the African people and are therefore suitable in

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<sup>80</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Lee. S., 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' Op Cit

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

<sup>87</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

<sup>88</sup> Ibid

upholding values that are held sacrosanct in African communities including peace, harmony, and cohesion<sup>89</sup>. AJS therefore suit well within traditional concepts of African justice, particularly its core value of reconciliation<sup>90</sup>.

It is imperative to institutionalise mediation and AJS in order to enhance their uptake towards promoting justice and reconciliation<sup>91</sup>. Institutionalising mediation and AJS is key in legitimizing these processes by providing elaborate legal and policy framework and guidelines for their application while also linking them to formal justice processes<sup>92</sup>. However, in legitimizing, mediation and AJS, it is vital to ensure that their key attributes including informality, voluntariness, confidentiality and party autonomy are preserved in order to ensure their suitability in promoting justice and reconciliation<sup>93</sup>. There has been progress towards mainstreaming AJS in Kenya through the *Alternative Justice Systems Framework Policy*<sup>94</sup>. The Policy notes that AJS is effective in promoting justice and reconciliation for the people of Kenya and reducing backlog of cases in courts<sup>95</sup>. The Policy sets out interventions towards mainstreaming AJS in Kenya including the formal recognition of AJS and identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; development of procedures and customary law jurisprudence; facilitation of effective intermediary interventions; and strengthened and sustainable resource allocation and mobilization towards AJS<sup>96</sup>. It is imperative to implement this Policy in

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<sup>89</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>90</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

<sup>91</sup> Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISINGALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 13/09/2024)

<sup>92</sup> Ibid

<sup>93</sup> Ibid

<sup>94</sup> Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

<sup>95</sup> Ibid

<sup>96</sup> Ibid

order to strengthen AJS in Kenya and address some of their key concerns including human rights violations and the potential to disregard procedural fairness<sup>97</sup>.

The role of mediation and AJS in promoting justice and reconciliation can also be enhanced by raising public awareness on the suitability and benefits of these processes<sup>98</sup>. It is also vital to build human and institutional capacity in order to have in place effective and efficient practitioners and institutions that can promote justice and reconciliation through mediation and AJS<sup>99</sup>.

Promoting justice and reconciliation through mediation and AJS is an achievable reality for the people of Kenya and Africa at large. It is imperative to actualize this agenda for peace, prosperity, and development.

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<sup>98</sup> Ibid

<sup>99</sup> Ibid

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Ademowo. A., 'Conflict Management in Traditional African Society.' Available at [https://www.researchgate.net/publication/281749510\\_Conflict\\_management\\_in\\_Traditional\\_African\\_Society](https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society)

Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

Bercovitch. J., 'Conflict and Conflict Management in Organizations: A Framework for Analysis.' Available at <https://ocd.lcwu.edu.pk/cfiles/International%20Relations/EC/IR403/Conflict.ConflictManagementinOrganizations.pdf>

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