

Upholding Ethics, Integrity and Best Practice in Mediation

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Abstract

Alternative Dispute Resolution (ADR) mechanisms are growing in Africa. These mechanisms are increasingly being embraced in management of disputes and are now being viewed as 'Appropriate' and not 'Alternative' in management of disputes. As ADR mechanisms including mediation continue to grow, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. The paper critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It also explores measures adopted towards fostering best practices in mediation at both the global and national level. The paper further suggests recommendations aimed at upholding ethics, integrity and best practice in mediation.

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1.0 Introduction

Mediation is one of the mechanisms classified under Alternative Dispute Resolution (ADR)¹. The concept of ADR entails a set mechanisms for that are applied in managing disputes that may be linked to but function outside formal court litigation processes². ADR has also been defined a set of processes that are applied to manage disputes without resort to adversarial litigation³. It encompasses various processes including negotiation, mediation, arbitration, conciliation, adjudication, expert determination, early neutral evaluation, and Traditional Dispute Resolution Mechanisms (TDRMs) among others⁴.

ADR mechanisms are recognized at the global level under the *Charter of the United Nations* which states that parties to a dispute shall first of all seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*⁵. Further, in Kenya, ADR mechanisms are recognized under the Constitution which mandates courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms⁶. ADR mechanisms are viewed as ideal in enhancing access to justice due to their attributes which include privacy, confidentiality, flexibility, informality, party autonomy and the ability to foster expeditious and cost effective management of disputes⁷.

Mediation as an ADR process has been defined as method 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, and thus aiding in the

¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

² Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴ Ibid

⁵ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 33 (1)

⁶ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

⁷ 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-and-development-inKenyaSTRATHMORE-CONFERENCE-PRESENTATION.pdf> (Accessed on 17/10/2023)

process of reaching an agreement⁸. It has been observed that mediation is a continuation of the negotiation process since it arises where parties to a conflict have attempted negotiations, but have reached a deadlock⁹. Parties therefore involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock¹⁰. It has been asserted that a mediator does not have the power to impose a resolution, 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 agreement¹¹.

Mediation has certain advantages which makes the process viable in managing disputes. Its key features towards this end include informality, flexibility, efficiency, confidentiality, party autonomy and the ability to promote expeditious and cost effective management of disputes¹². It has also the ability to preserve relationships due to its potential to address the root causes of the conflict thus negating the need for future conflict or conflict management¹³. Mediation alongside other ADR mechanisms have been practiced in Africa for many centuries¹⁴. These mechanisms were considered as 'Appropriate' and not 'Alternative' in management of disputes in Africa since they were able to safeguard values that were inherent in African societies and foster reconciliation, peace and social cohesion¹⁵.

It has correctly observed that mediation alongside other ADR mechanisms are growing in Africa due to the general acceptance across the board of ADR processes as ideal in

⁸ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition., 2017

⁹ Bercovitch. J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

¹⁰ Ibid

¹¹ Ibid

¹² Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

¹³ Ibid

¹⁴ Ibid

¹⁵ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 17/10/2023)

dispute management and adoption of measures such as Court Annexed Mediation in Kenya¹⁶. Consequently, as ADR mechanisms including mediation continue to grow, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. The paper critically discusses the need for standardization of mediation practice in Kenya by adopting best practices. It examines some of the challenges facing mediation practice in Kenya. It also explores measures adopted towards fostering best practices in mediation at both the global and national level. The paper further suggests recommendations aimed at upholding ethics, integrity and best practice in mediation.

2.0 Ethics, Integrity and Best Practices in Mediation

Ethics, integrity and best practices are fundamental in mediation. They serve various functions such as guiding the conduct of mediators, informing parties to the mediation process about the standards they should expect during the process and promoting public confidence in mediation as a conflict management process¹⁷.

Various standards have been developed towards enhancing ethics, integrity and best practices in mediation.

2.1 Impartiality

Impartiality in mediation requires a mediator to refrain from exhibiting favoritism or prejudice towards any party or any position taken by a party in mediation¹⁸. A mediator is expected to remain impartial throughout the course of the mediation¹⁹. Further, impartiality requires a mediator to be aware of and avoid the potential for bias based on

¹⁶ The World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans.' Available at <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> (Accessed on 17/10/2023)

¹⁷ Law Council of Australia., 'Ethical Guidelines for Mediators.' Available at <https://lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical> (Accessed on 18/10/2023)

¹⁸ JAMS Mediation Services., 'Mediators Ethics Guidelines.' Available at <https://www.jamsadr.com/mediators-ethics/> (Accessed on 18/10/2023)

¹⁹ Ibid

circumstances such as the parties' backgrounds, personal attributes, or conduct during the session, or based on any pre-existing knowledge of or opinion about the merits of the dispute being mediated²⁰. In the event that a mediator is unable to conduct the mediation process in an impartial manner, he or she is expected to withdraw from conducting the mediation²¹.

2.2 Conflict of Interest

A mediator is expected to avoid any conflict of interest during the conduct of the mediation. Conflict of interest in mediation may arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any party to the mediation, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality²². In order to avoid such situations, a mediator is expected to disclose all actual and potential conflicts of interest known to him or her²³. Further, the mediator is expected to disclose instances of conflict of interest that may arise during the course of the mediation²⁴. The rules on conflict of interest are aimed at preventing bias in mediation and fostering fairness and integrity of the mediation process²⁵.

2.3 Competence

Competence requires a mediator to know the limits of his or her ability; to avoid taking on disputes that he or she is not equipped to handle; and to communicate candidly with the parties about his or her background and professional experience²⁶. Competence in mediation comprises of appropriate knowledge and skills which would normally be

²⁰ Ibid

²¹ Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

²² McCorkle. S., 'The Murky World of Mediation Ethics: Neutrality, Impartiality, and Conflict of Interest in State Codes of Conduct.' 23 *Conflict Resol.* Q. 165 (2005-2006)

²³ Ibid

²⁴ Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

²⁵ Muigua. K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Available at <https://kmco.co.ke/wp-content/uploads/2022/05/Promoting-ProfessionalConduct-Ethics-Integrity-Etiquette-in-ADR.pdf> (Accessed on 18/10/2023)

²⁶ Hoffman. D., 'Ten Principles of Mediation Ethics.' Available at <https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf> (Accessed on 18/10/2023)

acquired through training, education, and experience²⁷. It has been asserted that a person who agrees to act as a mediator holds out to the parties an appropriate level of expertise and competence to mediate effectively²⁸. As a result, a mediator is expected to avoid taking disputes in cases where such a mediator is not competent and withdraw from acting in cases where he or she can no longer competently manage the dispute²⁹. Competence is vital in ensuring the integrity and appropriateness of the mediation process.

2.4 Privacy and Confidentiality

Privacy and confidentiality are among the key attributes of mediation³⁰. These features require mediators to safeguard the privacy of the mediation process by refraining from disclosing any matter that arose during the mediation including information about how the parties acted in the mediation process, the merits of the case, any settlement offers or agreed outcomes unless the parties agree otherwise³¹. Privacy and confidentiality are central to mediation since they allow parties to freely engage in candid, informal discussions of their interests towards reaching the best possible resolution of their dispute without concerns of such information leaking to third parties³². Mediators therefore have a duty to maintain privacy and confidentiality and not disclose any information to third parties unless in situations where such disclosure is allowed³³. Privacy and confidentiality are cardinal in upholding ethics, integrity and best practice in mediation.

²⁷ Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

²⁸ Ibid

²⁹ Ibid

³⁰ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

³¹ Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

³² Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' *University of Miami Law Review*, Volume 56, No.4

³³ Ibid

2.5 Quality of the Mediation Process

A mediator has an ethical duty to safeguard the quality of the mediation. He or she should ensure that the mediation proceedings are conducted in a satisfactory manner by encouraging mutually respectful behaviour among the parties³⁴. A mediator should further be diligent and ensure procedural fairness in order to foster the quality of the mediation³⁵. In addition, the mediator should discourage conduct by the parties which may undermine the quality of the mediation proceedings and terminate such proceedings where the parties' conduct undermines the quality of the mediation³⁶.

2.6 Costs and Fees

Mediators have an ethical duty to ensure full and fair disclosure of any costs and fees that the parties will incur during the mediation³⁷. In order to ensure integrity and best practice in regards to fees, a mediator is required to obtain an agreement from the parties about the fees and charges payable for the mediation and about how those fees and charges are to be apportioned between them³⁸. Further, a mediator should not charge fees based on the outcome of a mediation or calculated in a way that could influence the manner in which the mediator conducts the mediation³⁹. A mediator is therefore expected to ensure appropriateness and reasonableness of fees in order to uphold the integrity of the mediation⁴⁰.

2.7 Termination of Mediation

In order to uphold integrity and best practice in mediation, a mediator has an ethical duty to terminate the mediation proceedings in cases where a party is abusing the process or where there is no reasonable prospect for a resolution⁴¹. A mediator may also terminate

³⁴ Fullerton. R., 'The Ethics of Mediation-Arbitration.' Available at https://www.richardfullerton.com/ethics_article.pdf (Accessed on 18/10/2023)

³⁵ Ibid

³⁶ Ibid

³⁷ Hoffman. D., 'Ten Principles of Mediation Ethics.' Op Cit

³⁸ Mediation Training Institute, East Africa., 'Charging for Mediation.' Available at <https://mtieafrica.org/mediation-centre/charges-for-services/> (Accessed on 18/10/2023)

³⁹ Ibid

⁴⁰ Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

⁴¹ Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

mediation proceedings if he or she is of the view that a resolution is being reached that to the mediator appears unenforceable or illegal having regard to the circumstances of the dispute and the competence of the mediator for making such an assessment⁴². Termination of mediation proceedings is a key measure towards upholding ethics, integrity and best practice in mediation by preventing abuse of the mediation process and outcomes that may be illegal or unenforceable⁴³.

3.0 Enforcing Ethics, Integrity and Best Practices in Mediation

There has been progress towards enforcing the foregoing standards on ethics, integrity and best practices in mediation as set out in various laws, codes and institutional rules on mediation. The United Nations Commission on International Trade Law (UNCITRAL) envisages the use of mediation in management if disputes arising in the context of international commercial relations and has formulated mediation rules towards this end⁴⁴. The *UNCITRAL Mediation Rules* contain salient provisions geared towards upholding ethics, integrity and best practice in mediation⁴⁵. They stipulate appointment of a mediator with relevant professional expertise and qualifications and ability to conduct the mediation⁴⁶. They also envisage the appointment of an independent and impartial mediator⁴⁷. The rules also require a mediator to maintain fair treatment of the parties while conducting mediation proceedings⁴⁸. Further, the rules require all parties to the mediation to maintain confidentiality in relation to all information relating to the

⁴² Ibid

⁴³ Ibid

⁴⁴ United Nations Commission on International Trade Law Mediation Rules, 2021., Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf (Accessed on 18/10/2023)

⁴⁵ Ibid

⁴⁶ Ibid, Article 3 (4) (a)

⁴⁷ Ibid, Article 3 (4) (d)

⁴⁸ Ibid, Article 4 (2)

mediation, including, if relevant, the settlement agreement unless otherwise agreed by the parties or where disclosure is required by the law⁴⁹.

Upholding ethics, integrity and best practice in mediation is also a fundamental requirement under the United Nations Convention on International Settlement Agreements Resulting from Mediation (*Singapore Convention*)⁵⁰. The Convention provides the legal framework for enforcement of international settlement agreements resulting from mediation across jurisdictions⁵¹. The Convention sets out several grounds that may warrant refusal to grant relief in terms of enforcing an international settlement agreement resulting from mediation⁵². Such grounds include where there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement⁵³. In addition, this may arise where there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's *impartiality* or *independence* and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement⁵⁴. It is therefore important to uphold ethics, integrity and best practice in mediation in order to ensure enforcement of international settlement agreements resulting from mediation under the Singapore Convention.

The *International Chamber of Commerce (ICC) Mediation Rules*⁵⁵ also give prominence to ethics, integrity and best practice in mediation. The rules require a prospective mediator

⁴⁹ Ibid, Article 6

⁵⁰ United Nations General Assembly., 'United Nations Convention on International Settlement Agreements Resulting from Mediation.' A/73/496., Available at https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (Accessed on 18/10/2023)

⁵¹ Ibid

⁵² Ibid, Article 5

⁵³ Ibid, Article 5 (1) (e)

⁵⁴ Ibid, Article 5 (1) (f)

⁵⁵ International Chamber of Commerce., 'Mediation Rules, in force as from 1st January 2014.' Available at <https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> (Accessed on 18/10/2023)

to sign a statement of acceptance, availability, impartiality and independence before appointment or confirmation⁵⁶. A prospective mediator is also required to disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the mediator's impartiality⁵⁷. These provisions are aimed at upholding the ethical standards of independence and impartiality in mediation. Further, in order to uphold competence, the rules require the Centre to consider the attributes of the prospective mediator including skills, training, qualifications, experience and the ability to conduct the mediation when confirming or appointing a mediator⁵⁸. The rules also require the mediator to treat parties with fairness and impartiality while conducting the mediation⁵⁹. In addition, the rules require each party to act in good faith throughout the mediation in order to uphold ethics, integrity and best practice⁶⁰. The ICC mediation rules also uphold the ethical duty of confidentiality and require the proceedings and any settlement agreement to be kept private and confidential and not be disclosed unless by an agreement of the parties or where disclosure is required by applicable law⁶¹.

The *London Court of International Arbitration (LCIA) Mediation Rules*⁶² also seek to uphold ethics, integrity and best practice in mediation. In order to uphold competence, the rules require a prospective mediator to disclose his or her qualifications and past and present professional positions⁶³. A prospective mediator is also required to disclose any circumstances that may give rise to any justifiable doubts as to his or her impartiality or

⁵⁶ Ibid, Article 5 (3)

⁵⁷ Ibid

⁵⁸ Ibid, Article 5 (4)

⁵⁹ Ibid, Article 7 (3)

⁶⁰ Ibid, Article 7 (4)

⁶¹ Ibid, Article 9

⁶² The London Court of International Arbitration., Mediation Rules effective 1st October 2020., Available at https://www.lcia.org/Dispute_Resolution_Services/lcia_mediation_rules_2020.aspx (Accessed on 18/10/2023)

⁶³ Ibid, Article 4.1

independence⁶⁴. In addition, the rules require all parties to a mediation to uphold confidentiality and privacy⁶⁵. This is to be achieved by ensuring that all mediation sessions are private and are only attended by the mediators, the parties, parties' representatives and witnesses⁶⁶. Further, disclosure of any information regarding the mediation, any settlement terms or the outcome of the mediation is precluded unless agreed by the parties or required by law⁶⁷.

The *Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators*⁶⁸, also sets out fundamental ethical guidelines and best practices for persons appointed to mediate disputes under the *NCIA Mediation Rules*⁶⁹. Among the fundamental ethical requirements under the NCIA Code of Conduct for Mediators is independence and impartiality⁷⁰. Before accepting an appointment to act, a prospective mediator is required to disclose anything within his or her knowledge that may materially affect the mediator's impartiality⁷¹. The Code of conduct further requires a mediator to avoid conflict of interest or the appearance of a conflict of interest during and after mediation⁷². Conflict of interest in mediation may arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and either of the participants in the mediation process⁷³. The Code further requires a mediator to ensure that he or she has requisite competence required to mediate effectively before accepting appointment⁷⁴. Such competence in mediation can be acquired through

⁶⁴ Ibid

⁶⁵ Ibid, Article 12

⁶⁶ Ibid, Article 12.1

⁶⁷ Ibid, Article 12.3

⁶⁸ Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at <https://ncia.or.ke/wp-content/uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS2021.pdf> (Accessed on 18/10/2023)

⁶⁹ Nairobi Centre for International Arbitration (NCIA), Mediation Rules, 2015., Available at https://ncia.or.ke/wp-content/uploads/2021/02/mediation_rules_2016.pdf (Accessed on 18/10/2023)

⁷⁰ Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, Op Cit

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

education, training, experience and cultural understandings⁷⁵. In addition, the Code requires mediators to promote confidentiality, quality and fairness while conducting the mediation⁷⁶.

Upholding ethics, integrity and best practice is also envisaged under the *Kigali International Arbitration Centre Mediation Rules*⁷⁷. The rules require every prospective mediator to disclose any facts or circumstances which might affect or call into question his or her impartiality, independence or may be perceived to create a conflict of interest⁷⁸. Disclosure is also expected if such facts or circumstances arise in the course of the mediation⁷⁹. Further, under the rules, a mediator is expected to conduct the process with fairness to all parties and ensure that all parties have adequate opportunities to be heard⁸⁰. In addition, in order to ensure integrity and best practice in mediation, the rules require a mediator to terminate the process if the mediator determines that a settlement cannot be reached⁸¹. Another fundamental ethical requirement under the rules is confidentiality. The rules require every person involved in the mediation, including the parties, the mediator, and the Centre, to keep confidential all documents, information and materials as well as all terms of any settlement in connection with the mediation unless the parties expressly agree in writing or where disclosure is required under law⁸².

It is thus evident that there has been progress towards upholding ethics, integrity and best practice in mediation. However, some ethical dilemmas are likely to arise in mediation. It has been asserted that the impartiality of mediators is often challenged by prior relationships with the parties or their emotional reactions to the parties' behavior

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Kigali International Arbitration Centre., 'Mediation Rules, 2015.' <https://kiac.org.rw/wp-content/uploads/2023/06/Mediation-Rules.pdf> (Accessed on 19/10/2023)

⁷⁸ Ibid, Article 7

⁷⁹ Ibid

⁸⁰ Ibid, Article 8 (2)

⁸¹ Ibid, Article 9 (1) (b)

⁸² Ibid, Article 12 (1)

during mediation⁸³. Further, mediators often face the ethical dilemma of maintaining confidentiality in cases of possible illegal actions of the parties or the potential of unfair settlement, or where disclosure will convince the party to accept a settlement proposal⁸⁴. Further, since mediation is premised on voluntariness, ethical challenges may arise in cases of lack of consent due to coercion, mental disturbance or lack of information⁸⁵. Further, it has been observed that most mediators are often torn in between impartiality and the temptation to give solutions or direct the process toward more fair solutions and the tension between staying neutral and providing necessary professional legal or therapeutic advice⁸⁶.

It has also been argued that ethical problems may arise where mediation is used by the parties to gain information, win time, or intimidate the other party⁸⁷. Mediators also often face competence challenges since in certain cases the skills that the dispute demands go beyond the mediator's training and often involve interpreting psychological or emotional aspects of conflict⁸⁸. In addition, in processes such as Court Annexed Mediation in Kenya, a mediator may face ethical concerns between the parties' interests for fair and efficient process and pressure from the court to finish the case in time⁸⁹. Ethical problems may also arise in respect of costs and fees of mediation in instances where mediators charge exorbitant fees thus defeating the essence of mediation of facilitating cost effective

⁸³ Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Available at <https://www.beyondintractability.org/bksum/bush-dilemmas> (Accessed on 19/10/2023)

⁸⁴ Ibid

⁸⁵ Burns. R., 'Some Ethical Issues Surrounding Mediation.' Available at https://www.researchgate.net/publication/228187058_Some_Ethical_Issues_Surrounding_Mediation#:~:text=A%20progressively%20larger%20portion%20of,of%20mediation%20without%20much%20change. (Accessed on 19/10/2023)

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf> (Accessed on 19/10/2023)

⁸⁹ Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

management of disputes⁹⁰. It is necessary to address these concerns in order to uphold ethics, integrity and best practice in mediation.

4.0 Way Forward

In order to uphold ethics, integrity and best practice in mediation, it is imperative to enhance training and standards among mediators. It has been asserted that training of mediators can help them recognize the existence and importance of ethical dilemmas in mediation and generate responses to them in specific situations⁹¹. In addition, training is vital in making mediators familiar with the standards of practice, with what are appropriate and inappropriate responses to ethical dilemmas⁹². It has further been asserted that there is a need for the mediators to continually engage in continuous professional development seminars to enable them appreciate the relevant skills that they must acquire in their journey to becoming effective mediators⁹³. These skills include the ability to identify and address any psychological dimensions of the conflict in the mediation process⁹⁴. Training is thus vital in enabling mediators uphold ethics, integrity and best practice in mediation.

Further, it vital for mediation service providers such as mediation centres and institutions to facilitate adherence to ethical standards, integrity and best practices in mediation⁹⁵. Ethical codes and standards formulated by various ADR bodies including mediation centres and institutions have been criticized as being merely soft law norms which lack

⁹⁰ Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

⁹¹ Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Op Cit

⁹² Ibid

⁹³ Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation.' Op Cit

⁹⁴ Ibid

⁹⁵ Anderson. D., 'The Importance of Ethics in the Practice of Mediation.' Available at https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5776&context=sol_research (Accessed on 19/10/2023)

enforcement⁹⁶. It is therefore important to ensure that such codes and standards are enforced in order to uphold ethics, integrity and best practice in mediation. It has been pointed out that the primary regulators of ethical conduct, integrity and best practice in ADR are the appointing institutions and parties through challenge procedures⁹⁷. Mediation centres and bodies can therefore foster ethics, integrity and best practice in mediation through exercising due diligence while appointing mediators in order to avoid cases of impartiality and conflict of interest and ensure competence, fostering institutional oversight during the mediation to ensure compliance with ethics and best practice, facilitating communication between the parties and addressing allegations of ethical breaches during mediation⁹⁸.

Mediators also have a role to ensure that the mediation process is conducted in a manner that upholds ethics, integrity and best practice. Mediators should ensure that they adhere to the rules of ethics, integrity and best practice in mediation⁹⁹. This includes avoiding conflict of interest, being impartial during the mediation process, accepting appointments only in cases where they are competent, conducting the mediation process with fairness and integrity and maintaining the confidentiality of the process¹⁰⁰. Advocates and parties' representatives in mediation also have a duty to uphold ethics, integrity and best practice by acting with diligence, competence and honesty¹⁰¹. They have a duty to be courteous towards each other and to also avoid misleading the mediator¹⁰². Parties also have a duty to uphold ethics, integrity and best practice in mediation by acting in a courteous

⁹⁶ Hacking, L., & Berry, S., 'Ethics in Arbitration: Party and Arbitral Misconduct.' Available at <https://www.lordhacking.com/Documentation/Hacking%20&%20Berry%20-%20Ethics%20in%20Arbitration%20April%202016.pdf> (Accessed on 19/10/2023)

⁹⁷ Ibid

⁹⁸ Anderson, D., 'The Importance of Ethics in the Practice of Mediation.' Op Cit

⁹⁹ Muigua, K., 'Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR.' Op Cit

¹⁰⁰ Ibid

¹⁰¹ Anderson, D., 'The Importance of Ethics in the Practice of Mediation.' Op Cit

¹⁰² Ibid

and respectful manner towards each other and the mediator and disclosing all material facts to aid in the negotiations and resolution of the dispute¹⁰³.

In addition to the foregoing measures, it is important to continue enhancing access to justice in Africa through ADR mechanisms including mediation. Mediation alongside other ADR mechanisms have been part and parcel of the African culture since time immemorial and were always the first point of call whenever a dispute arose¹⁰⁴. These mechanisms were able to safeguard the values and ethics inherent in African societies including peace, reconciliation, and restoration of social harmony¹⁰⁵. They were therefore considered as 'Appropriate' and not 'Alternative' in management of disputes¹⁰⁶. There is need to (re)focus mediation and other ADR mechanisms in Africa in a manner that fosters the true spirit of conflict management inherent in African societies which is reconciliation and restoration of parties' relationships¹⁰⁷. This will be integral in realizing the potential of ADR as 'Appropriate' Dispute Resolution in Africa¹⁰⁸.

5.0 Conclusion

ADR mechanisms including mediation are growing in Africa due to the general acceptance across the board of ADR processes as ideal in dispute management¹⁰⁹. Consequently, as ADR mechanisms including mediation continue to grow, there is a need to create standards and uphold international best practices that will ensure effective and efficient access to justice for all. Some of the standards adopted towards upholding

¹⁰³ Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 *Fordham Urb. L.J.* 979-990 (2001)

¹⁰⁴ Muigua. K., 'Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Available at <https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 19/10/2023)

¹⁰⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹⁰⁶ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ The World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans.' Op Cit

ethics, integrity and best practice in mediation include impartiality, rules on conflict of interest, competence, privacy and confidentiality, quality of the mediation process and rules on costs and fees¹¹⁰. However, several ethical problems may arise in mediation which may affect impartiality, confidentiality, competence, quality and integrity of the mediation process¹¹¹. It is therefore necessary to uphold ethics, integrity and best practice in mediation. This can be achieved through enhancing training and standards for mediators, facilitating adherence to ethical standards, integrity and best practices in mediation by mediation centres and institutions, encouraging mediators to conduct mediation proceedings in a manner that upholds ethics, integrity and best practice¹¹². It is also important to continue enhancing access to justice in Africa through ADR mechanisms including mediation in a manner that fosters the true spirit of conflict management inherent in African societies which is reconciliation and restoration of parties' relationships¹¹³. Upholding ethics, integrity and best practice in mediation is practicable.

¹¹⁰ Law Council of Australia., 'Ethical Guidelines for Mediators.' Op Cit

¹¹¹ Bush. R., 'The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications.' Op Cit

¹¹² Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

¹¹³ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

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